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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SAN FRANCISCO POLICE OFFICERS ASSOCIATION, LYNNE A. TORRES, LILLIAN CHAI MATTOCH, and HENRY KIRK,
Petitioners,

VS.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; CIVIL SERVICE COMMISSION; LOUIS HOP LEE, REVEREND DR. HOWARD S. GLOYD, CARLOTA TEXIDOR DEL PORTILLO, GENEVIEVE W. POWELL, and A. LEE MUNSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does Title VII (42 USC 2000(e) *et seq.*) require federal courts to fashion appropriate relief (including promotions, back pay, and retroactive seniority) to identifiable victims of "reverse discrimination" employment decisions made by a public employer under the guise of "affirmative action," where the courts have finally and conclusively found the challenged promotions to be violative of both Title VII and a Consent Decree entered pursuant to 42 U.S.C. 2000e-5(g)?

THE PARTIES

The parties to the proceedings below are Petitioners San Francisco Police Officers Association, Lynne A. Torres, Lillian Chai Mattoch and Henry Kirk. Respondents are the City and County of San Francisco, a municipal corporation; its Civil Service Commission; and Commissioners Louis Hop Lee, Reverend Dr. Howard S. Gloyd, Carlota Texidor Del Portillo, Genevieve W. Powell, and A. Lee Munson. The Association is the labor organization representing police officers, sergeants, and inspectors in their employer-employee relations with the City. Torres, Mattoch and Kirk took the promotional examinations described herein and were adversely affected by the post-test "reweighting" of examination components, weights, and cutoffs described herein.

California Organization of Police and Sheriffs participated as Amicus Curiae on behalf of the Petitioners. The Department of Justice of the United States of America participated as Amicus Curiae on behalf of Respondents. Officers for Justice, et al., participated as Intervenors on behalf of Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners San Francisco Police Officers Association, Lynne A. Torres, Lillian Chai Mattoch, and Henry Kirk respectfully request that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on March 7, 1989.

OPINIONS BELOW

The Opinion of the Court of Appeal for the Ninth Circuit is reported at 869 F.2d 782 (9th Cir. 1988) (Appendix A, *infra*). The order denying Petitioners' Petition for Rehearing and Re-

jecting the Suggestion for Rehearing *en banc* (Appendix B, *infra*) is not reported.

Two previous opinions in the same proceeding of the Court of Appeals are reported at 842 F.2d 1126 (9th Cir. 1988) (Appendix C, *infra*) and 812 F.2d 1126 (9th Cir. 1987) (Appendix D, *infra*). The Court's order vacating its 1987 opinion (Appendix E, *infra*) is not reported. The memorandum decisions of the District Court for the Northern District of California are reported at 621 F.Supp. 1221 (DC Cal. 1985) (Appendix F, *infra*) and 621 F.Supp. 1225 (DC Cal. 1985) (Appendix G, *infra*). The order of the United States District Court approving the Consent Decree and the Consent Decree (Appendix H, *infra*) are reported at 473 F.Supp. 801 (DC Cal. 1979).

JURISDICTION

Petitioners initially brought this action in the Superior Court of the State of California in and for the City and County of San Francisco on June 7, 1984. Respondent City removed the case to the United States District Court for the Northern District of California under the Consent Decree (473 F.Supp. 801) and pursuant to the provisions of 28 U.S.C. § 1443(2). On June 12, 1985, the District Court ordered that Judgment be entered in favor of Defendants. *San Francisco Police Officers Association, et al. v. City and County of San Francisco, et al.*, 621 F.Supp. 1225 (DC Cal. 1985).

On Petitioners' appeal, the Ninth Circuit, on March 7, 1989, entered its third and final Opinion reversing the District Court's Order and Judgment, holding that the City had violated the Consent Decree and Title VII by discriminating on the basis of race and sex. The Court's Opinion, however, refused to afford Petitioners any remedy or relief for the acts of discrimination condemned by the Court.

The jurisdiction of this Court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 2000e-5(g). *Injunction; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.*

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 704 (a) [42 U.S.C. § 2000e-3(a)].

STATEMENT OF THE CASE

On March 7, 1989, the Court of Appeals issued its Opinion that Petitioners (primarily, but not exclusively, male, non-minority police officers) had been victims of race and sex discrimination when test scores on promotional examinations for Sergeant and Inspector were unilaterally changed by Respondents to benefit women and minorities. The Court, however, held that these

"reverse discrimination" victims (who lost promotions) were not entitled to *any* remedy or relief, despite the promotion of 120 fellow officers to Sergeant or Inspector from the "reweighted" lists. The Court found that applicants who did well on the test *prior* to the City's illegal changing of the scores did not acquire any rights, even though the examinations were developed in conformity with a Consent Decree and the *Uniform Guidelines on Employee Selection*. The court thereby dramatically ignored the procedural and substantive rights of non-minority Title VII victims to "make whole" relief, notwithstanding its determination of City liability for egregious employment wrongs committed under the guise of "affirmative action."

Had the flip side of this controversy occurred—test scores altered to favor white males to the detriment of minorities and women—the Ninth Circuit would have swiftly remanded the case to the District Court to fashion a remedy for obvious wrongs committed against (more traditional) victims of discrimination. But the Court of Appeals chose to ignore Mr. Justice Powell's observation in *Regents of the University of California v. Bakke*, 438 U.S. 265, 289-90 (1978):

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of a different color. If both are not accorded the same protection, then it is not equal.

This denial of any remedy to victims in a successful Title VII "reverse discrimination" case directly conflicts with the decision of the District of Columbia Circuit issued (on the very same day in a case with identical facts) in *Dougherty v. Barry*, 869 F.2d 605 (D.C.Cir., March 7, 1989). *Dougherty* properly rejected any distinctions between the "types" of discrimination victims in fashioning appropriate Title VII relief. See *infra*, pp. 12-13.

The Ninth Circuit's mistaken conclusion that initial examination results which show adverse impact can never be used also presents the same important and difficult question of delineating minorities' and nonminorities' rights which three justices of this court voted to review in *Bushey v. New York State Civil Service Commission*, 469 U.S. 1117 (1985). See *infra*, pp. 17-19.

This Petition arises out of a Title VII case originally filed in 1973 and settled in 1979 when the District Court approved a Consent Decree between Plaintiffs Officers for Justice (OFJ) and the United States, Defendant City (including the City's Civil Service Commission) and Intervenors San Francisco Police Officers Association (POA). See *Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801 (N.D. Cal. 1979), *aff'd* 688 F.2d 615 (9th Cir. 1982). (Appendix H.)

To discharge its obligations under the Decree, the City, on order of the Court, established a "Consent Decree Unit" to develop and administer hiring and promotional examinations. During 1983, the Unit developed examinations for Sergeant and Inspector. A thorough job analysis was done prior to the development of the examinations. Expert consultants were used. Previous tests were reviewed. Subject matter experts were utilized to list typical job tasks. Incumbent Sergeants and Inspectors were interviewed, and substantial time—in excess of 100 hours—was spent observing people on the job. A court-appointed panel of experts, including psychologists with expertise in test preparation, provided assistance.

The exams had three components: a written multiple choice exercise, a written communication exercise, and a structured oral interview. Each component was designed specifically to measure different dimensions found by the job analysis to be essential for successful performance as a Sergeant or Inspector. The multiple choice component was considered the best tool for measuring technical knowledge and problem solving. The written test, in an essay format, evaluated written communication skills. The oral test measured verbal communication skills, supervisory skills and interpersonal ability. Each component was developed through an intensive, arduous process that assured the fairness and job-relatedness of the overall examination.

On this record, there can be no doubt (nor was there any contention) about the Unit's good faith efforts to construct fair and content-valid examinations, in conformity with the requirements of the Consent Decree, which requires compliance with the *Uniform Guidelines on Employee Selection Procedures. Officers for Justice v. Civil Service Commission, supra,* 473 F.Supp. 801,

812. (Appendix H.) Paragraph 4 of the Consent Decree also requires pre-test review of validity data by the parties:

> All evidence of validity of proposed test standards or selection procedures (for hiring or promotion) to be used subsequent to the entry of this Decree shall be submitted to the parties' counsel for review and comment at least sixty days prior to their implementation. *Officers for Justice v. Civil Service Commission, supra,* 473 F.Supp. 801, 812. (Appendix H-18, 19.)

It is totally undisputed that the parties to the Decree (OFJ, the United States, the City and the POA) were afforded the opportunity to review the evidence of the validity of the examinations at least sixty days prior to their administration. It is also undisputed that no objections as to validity were made by any party before the initial publication of exam results by race and sex.

Prior to the administration of the examinations, the Civil Service Commission set cut-off scores and weights for the three examination components (multiple choice, writing skills and structured oral). The examinations were then administered and the results tabulated by race and sex. Without revealing the identities of the candidates, the scores showed an adverse impact on minorities in both examinations, a slight adverse impact on women on the Sergeant's examination, and no adverse impact for women on the Inspector's examination.

Because of this adverse impact, the United States and Officers for Justice objected not to the examinations themselves but to the use of the *results.* Upon the advice of the City Attorney and without any further analysis of the validity or job-relatedness of the examination, the Commission revised the cut-off and weighing standards for the sole and exclusive purpose of elevating 51 more women and minorities to places on the list where they were "reachable," with the natural and inevitable consequence of lowering the positions on the same lists of 51 other candidates (primarily, but not exclusively, white males) to positions where these 51 were not "reachable."

Under the revisions ordered by the Commission, the oral component of the examinations (the most subjective portion)

became the sole ranking device. As a result, minority appointments to Inspector rose from 8% to 22% and minority appointments to Sergeant from 10.4% to 24%. Corresponding numbers of "non-favored" (i.e., non-minority) candidates saw *their* rankings, and respective chances for promotion, decrease in the same scale.

In addition to this reweighting, the City, OFJ and the United States also agreed to promote only 120 candidates, in rank order, all on the same day to satisfy Paragraph 10(a)(4) of the Consent Decree, which obligated the City to appoint annually 25 persons to Sergeant and 15 persons to Inspector from August 1, 1981 through the termination of the Decree.

Following the Commission's decision to change selection procedures, the POA and three named Plaintiffs filed suit in State Court; the case was removed to Federal Court; the District Court ultimately ruled that the City's plan was permissible under *Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) and ordered the City to make 120 promotions to Inspector and Sergeant from the eligibility lists derived from the re-weighted examinations. *San Francisco Police Officers Association v. City and County of San Francisco, supra,* 621 F. Supp. 1225. (Appendix F.)

A total of 120 officers were thus promoted in rank order to Sergeant and Inspector on April 1, 1986, notwithstanding the fact that, as of that date, Paragraph 10(a)(4) of the Decree required 125 Sergeants and 75 Inspectors, a total of *200* promotions.

The POA timely appealed to the Ninth Circuit.

The Ninth Circuit rendered three different Opinions. In its first Opinion (of March 12, 1987), the Ninth Circuit reversed, holding that "reweighing the examination unnecessarily trammeled the interests of the non-minority police officers"; that the reweighing was not neutral, because "race and gender were the deciding factors in determining how the test scoring should be restructured"; and that the persons whose scores had been altered were victims because "... reweighing unlawfully displaced candidates on the basis of their race and gender" *San Francisco Police Officers Association City and County of San Francisco,* 812 F.2d

1125, 1131-1132) (Appendix D-13). However, remedy and the status of those promoted were not addressed.

All parties therefore petitioned for rehearing and on August 17, 1987, the Court vacated its March 12, 1987 Opinion, denied each petition for rehearing, rejected the suggestion for rehearing en banc and promised to file an "Amended Opinion" reversing the District Court but permitting the 120 new promotees to keep their promotions. (Appendix E).

In its second Opinion (issued on March 24, 1988), the Ninth Circuit reconsidered its first Opinion and determined that the appeal was moot:

> Officers have been promoted on the basis of the revised test. These beneficiaries of the revision did not cause the City to do what it did. It would be inequitable to penalize them by ousting them from their positions. *United States v. Navajo Freightlines,* 525 F.2d 1318, 1326 (9th Cir. 1975) (per Sneed, J.). No individual has a right to any particular position because the original test was not validated under the Consent Decree. Even an individual who has been the subject of discriminatory practice is not automatically entitled to have an incumbent laid off to provide a place. *Firefighters v. Stotts,* 467 U.S. 561, 579, 104 S.Ct. 2576, 2588, 81 L.Ed.2d (1984). Much less is there such entitlement when no particular individual can show injury from the discrimination practiced.
>
> There is no need to tell the City that it should not engage in discriminatory weighting of parts of an examination it has already given and weighted. The City now concedes a Supplemental Order of the District Court dated October 27, 1986, "protects against scoring standards being set before examinations and then changed after examinations." The City's position is the concession that binds it. It is unnecessary to express the City's obligation in another injunction. Our Opinion of March 12, 1987, 812 F.2d 1125 is accordingly withdrawn. Dismissed as moot. *San Francisco Police Officers' Association, et al. v. City and County of San*

Francisco, et al., 842 F.2d 1126, 1128 (9th Cir., 1988) (Appendix C-2, 3.).

Judge Wiggins, in dissent, commented:

> Certainly, however, the affects of the City's violation have not been eradicated. The officers who had previously scored in the top group and then were displaced by the reweighting still suffer the effects of the City's discriminatory practice. Their seniority, pay and rank in the Department are still adversely affected by the rescoring. It cannot be said that interim relief or events have completely and irrevocably eradicated the affects of the City's violation. These officers still possess completely cognizable claims for the effects of the City's discriminatory practice as it affected their careers in the Department.
>
> It is unacceptable to me that this Court finds a test to be improperly administered to the detriment of specific Plaintiffs, but refuses to grant relief. To permit those who have been improperly rewarded to retain their positions is simply renouncing our duty to correct legal errors. Specific Plaintiffs have experienced specific wrongs.
>
> Nor is the avoidance of the asserted inequitable result of ousting the incumbent officers from their positions an adequate justification for the majority's action. The majority agrees that the incumbent officers were improperly selected. These improperly selected officers gain no equity by reason of their occupancy of unearned positions. That they were personally uninvolved in wrongfully reweighing the test is irrelevant. Plaintiffs are just as innocent. We should not chose between innocent classes. We should simply order the test to be regiven fairly and accept its results. *San Francisco Police Officers' Association v. City and County of San Francisco, supra,* 842 F.2d 1126, 1128-1129. (Appendix C-4.)

Petitioners filed another Petition for Rehearing and Suggestion for Rehearing en banc. The Ninth Circuit's third (and final) Opinion of March 7, 1989 voided its second Opinion (of March 24, 1988), again reversed the decision of the District Court, but denied any remedy or relief to the victims of the "reweighting":

> The test itself was not in compliance with the Consent Decree, so the persons who did well on it did not acquire any rights. When, however, the City arbitrarily changed the weighting and promoted on the basis of this weighting, the City violated the Consent Decree by discriminating on the basis of race and sex. The victims of this discrimination were not the particular officers who had done well under the first weighting, as they had acquired no rights, but the larger group of all the white males who took the test and who were passed over by the discriminatory weighting and subsequent promotions. *San Francisco Police Officers' Association, et al., v. City and County of San Francisco, et al.*, 869 F.2d 1182, 1184 (9th Cir. 1989). (Appendix A-2, 3)

The Ninth Circuit thus ignored the obligation of federal courts to provide "make whole" relief for victims of employment discrimination, a result which (1) leaves victims of Title VII employment "reverse discrimination" remediless; (2) suggests to public employers in general that they can freely discriminate against caucasians and males, with impunity as to remedy, provided only that they "promise not to do it again;" and (3) conflicts with decisions of other Circuits regarding remedies for victims of "reverse discrimination". The Ninth Circuit also erred in concluding that the victims had not acquired any rights by virtue of the initial examination results and that the only possible remedy was to oust the new promotees from their positions.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Denial of Any Remedy for Successful Reverse Discrimination Litigants Conflicts with Decisions of This Court Confirming the Duty Under Title VII to Provide a Remedy for Minority Victims of Discrimination.

The Ninth Circuit's decision stands in stark contrast to Title VII decisions of this court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975), *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S.Ct. 1251 (1976) and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

This Court in *Albemarle Paper v. Moody, supra,* emphasized that victims of employment discrimination must be made whole:

> It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the court with full equitable powers. . . . Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory affects of the past as well as bar like discrimination in the future. *Louisiana v. United States,* 380 U.S. 145, 154, 13 L.Ed.2d 709, 85 S.Ct. 817 (1965). And where a legal injury is of an economic character,
>
> > "[T]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock,* 6 Wall 94, 99, 18 L.Ed. 752 (1867).
>
> . . . It follows that, given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The Courts of Appeals must maintain a consistent and principled application of the back pay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will have the keener appreciation of those facts and circumstances peculiar to particular cases. 422 U.S. 405, 418-422.

This Court in *Franks v. Bowman Transportation Co.,* reiterated that victims of discrimination should be provided relief and that district courts have the duty to choose among the various remedies, including back pay, seniority, reinstatement or other equitable relief:

> In holding that class-based seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under § 706(g) we do not in any way modify our previously expressed view that the statutory scheme of Title VII "implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary, these choices are, of course, left in the first instance to the district courts." *Albemarle Paper Company,* 422 U.S., at 416, 45 L.Ed.2d 280, 95 S.Ct. 2362. 424 U.S. 779. *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 96 S.Ct. 1251 (1976).

This Court, in *Teamsters v. United States,* held specifically that, once it has been established that an employer has followed an employment policy of unlawful discrimination, the burden rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons and that every discriminatee will be presumptively entitled to relief, subject to a showing by the employer that the decision was not based on his policy of discrimination. 431 U.S. 324, 362.

The conflict between the instant case and *Albemarle, Franks,* and *International Brotherhood of Teamsters* could not be more apparent. The *only* difference is that here the discriminatees are non-minorities. Were this not the case, the Ninth Circuit surely would have remanded the matter to the District Court to fashion a remedy. Instead, the Ninth Circuit, on its own initiative, made a final determination that no remedy whatsoever was appropriate.

II. The Ninth Circuit's Denial of a Remedy for Nonminority Victims of Discrimination Directly Conflicts with Decisions in Other Circuits in *Dougherty v. Barry,* 869 F.2d 605 (D.C. Cir. 1989), *Cygnar v. City of Chicago,* 865 F.2d 827 (7th Cir. 1989) and *Lilly v. City of Beckley, West Virginia,* 797 F.2d 191 (4th Cir. 1986).

Dougherty, decided the same day, involves facts remarkably similar to the instant case. The District Court determined that eight white firefighters were victims of "reverse" racial discrimination when two black firefighters were promoted to Deputy Fire Chief, in violation of both Title VII and 42 U.S.C. § 1981. The

public employer, like San Francisco, argued that none of the eight discriminatees were entitled to relief because, in any event, not one of them would have received a promotion absent discrimination. On appeal the D.C. Circuit held that it was the employer's burden to prove that each individual would not have been promoted and thus should be denied a remedy:

> Turning to the question of monetary recovery, we reject appellants' argument that appellees are not entitled to any relief because two other whites, Joseph R. Granados and Harry H. Shaffer, would have gotten the promotions absent discrimination. As the District Court held, once appellees proved they had been subjected to disparate treatment, the burden shifted to appellants to show *by clear and convincing evidence* that appellee was not entitled to relief because he would not have received one of the promotions even absent discrimination. (Citations omitted.) Appellants failed to carry their burden in this case. 869 F.2d 605, 614. (Emphasis added.)

The *Dougherty* court, after finding that the District Court was unable to determine, with certainty, which two of the white firefighters would have received promotions, decided that *each* victim should be awarded a fraction of the promotion's value commensurate with the likelihood of his receiving one of the promotions. 869 F.2d 605, 615.

In contrast to *Dougherty* the Ninth Circuit failed in this case to remand the question of the appropriate remedy to the District Court, thus ignoring Petitioners' procedural rights to a showing by the City, "by clear and convincing evidence," that each Petitioner was not entitled to relief. Remand is necessary, because the District Court must determine, from a factual point of view, (1) how many officers should have been promoted in 1986 to comply with the Consent Decree's promotional requirements and (2) which of the officers who participated in the examinations would have been promoted absent discrimination, given the obligation and tradition in the Police Department of promotions in rank order. The Ninth Circuit, however, cut off this inquiry by determining that the reverse discrimination victims were not entitled to any remedy whatsoever.

Cygnar v. City of Chicago, 865 F.2d 827, 847-848 (7th Cir. 1989) upheld (though reduced) damage awards in a "reverse discrimination" case in the Chicago Police Department, where white detectives were transferred out of their positions and replaced by minority officers politically aligned with the Mayor. Although the damage award flowed from a finding of racial discrimination in violation of the Fourteenth Amendment, thereby supporting an award of compensatory damages, there was no question but that victims of "reverse discrimination" should be treated no differently than minority victims of racial discrimination. The Ninth Circuit's decision here is in stark contrast to this Seventh Circuit decision which holds that, once racial discrimination of *any* kind is found, the District Court must fashion some appropriate remedy.

In *Lilly v. City of Beckley, West Virginia,* 797 F.2d 191, 196 (4th Cir. 1986), the Court affirmed a reinstatement and back pay award to Mr. Lilly, a victim of "reverse discrimination". The Fourth Circuit held that Lilly, a white man, was no less a victim of discrimination and should be entitled to the same remedies as any other victim of race discrimination. In the instant case, when the Ninth Circuit failed to remand to the District Court for determination of remedy, the strong implication that victims of reverse discrimination should be treated differently seems obvious and must be corrected.

III. The Ninth Circuit's Decision Also Conflicts with the Opinion of the District Court in *Wilmington Firefighters v. City of Wilmington* that Victims of Reverse Discrimination have Identifiable Rights to Valid, Previously Announced Examination Procedures.

The Ninth Circuit, in support of its conclusion that no remedy is available to the non-minority officers, relied on the conclusion that:

> The test itself was not in compliance with the Consent Decree, so the persons who did well on it, did not acquire any rights. When, however, the City arbitrarily changed the weighting and promoted on the basis of this weighting, the City violated the Consent Decree by discriminating on the

> basis of race and sex. The victims of this discrimination were not the particular officers who had done well on the first weighting, as they had acquired no rights, but the larger group of all the white males who took the test and who were passed over by the discriminatory weighting and subsequent promotions. *San Francisco Police Officers' Association v. City and County of San Francisco, supra,* 869 F.2d 1182, 1184. (Appendix A-2, 3.)

These conclusions regarding examination participants' rights are erroneous. The Consent Decree provides in Paragraph 4, that:

> The City shall . . . make no further use of . . . ., tests, qualifications, standards or other procedures within said Department which have a disproportionately adverse impact against minorities or females, unless and until such standards have been shown to be valid, pursuant to the *Uniform Guidelines of Employee Selection Procedures,* 43 Fed.Reg. 38290, August 25, 1978, or any superceding federal guidelines. All evidence of validity of proposed tests, standards or selection procedures to be used subsequent to the entry of this Decree shall be submitted to the parties' counsel for review and comment at least 60 days prior to their implementation." *Officers for Justice v. Civil Service Commission, supra,* 473 F.Supp. 801, 812. (Appendix A-18, 19.)

The City not only violated Paragraph 1 of the Consent Decree (which generally prohibits *all* race and sex based discrimination) by changing previously announced examination weights to favor minorities and women, but also violated Paragraph 4 by refusing to defend the initial results, especially when the content-validity of the examinations was not challenged.

Wilmington Firefighters v. City of Wilmington, 632 F.Supp. 1177 (Del. 1986); dismissed as moot, 824 F.2d 262 (3rd Cir. 1987) presents an identical case of a City changing previously announced examination component weights to favor minorities. The District Court specifically found that alteration of test scoring procedures was not authorized by a Consent Decree and enjoined the use of the revised results. The district court stated:

> The candidates for promotion were informed that the promotion testing procedures were to be conducted according to the guidelines outlined in General Notice 84-3. The candidates, having served the required number of years to become eligible for promotion, have a reasonable, legitimate expectation that the City will deal fairly with them in administering these tests. They have a legitimate expectation that the tests and promotion ranking will be conducted according to the fair and presumably valid procedures announced. The members of the plaintiff class, who would rank higher on a promotional list compiled according to these procedures than on the City's revised list, have been treated unfairly by the City's actions in unilaterally altering these procedures in the middle of the testing process, for the race based purpose of avoiding a disparate impact on minority firefighters. 632 F.Supp. 1177, 1191-1192.

The District Court held that the City had violated both the Consent Decree and Title VII. But Wilmington had made no promotions from the tainted list and the list had expired; the Third Circuit, therefore, dismissed the City's appeal as moot and vacated the district court's decision. The district court, however, would have required Wilmington to first defend the validity of the examination before engaging in race-based alteration of the initial results.

In the instant case, the City, pursuant to Paragraph 4 of the Decree, sent evidence of examination validity to the parties sixty (60) days before the examination. No party objected. Validity was never an issue in the District Court proceedings. OFJ and the United States never objected to the tests, their preparation, administration or content, only to the results. Prior to the completion of the examinations the Civil Service Commission publicly established and announced the weights of the three examination components. Using these weights showed adverse impact. Rather than validating the tests, on a *post hoc* basis, or insisting that OFJ or USA demonstrate lack of validity, the City engaged in the politically expedient and popular tactic of "affirmative action" by juggling the scores. The "reverse" discrimination victims certainly

have a right to the enforcement of Paragraph 4 of the Decree and to a showing that the test procedures were *not* valid.

Wilmington, supra, is not cited herein for authority, as the case was remanded and vacated, but simply to illustrate the confusion surrounding this issue and to highlight the erroneous reasoning of the Ninth Circuit Court that victims of reverse discrimination are not entitled to a remedy.

IV. The Ninth Circuit's Mistaken Conclusion that Initial Employment Test Results which Show Adverse Impact are Invalid Presents Difficult and Important Issues of Delineating Minorities and Non-Minorities Rights Under Title VII and Raises Questions of First Impression Before this Court.

The Ninth Circuit has left 51 police officers remediless notwithstanding its own, unanimous finding of illegal employment discrimination by their employer on the basis of their race and sex. By reversing the District Court on the issue of discrimination but refusing to remand to fix a remedy, the Ninth Circuit thus allowed the City to enjoy, with complete impunity, the fruits of unwarranted race-conscious tactics. The Ninth Circuit erroneously concluded that the initial results of the examinations were "not in compliance with the Consent Decree". This conclusion is clearly wrong: the City was fully authorized, under Paragraph 4 of the Decree and the *Uniform Guidelines*, to use examinations which have adverse impact on minorities so long as the examinations have been shown to be valid. *See Griggs v. Duke Power Company*, 401 U.S. 424, 432 (1971); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

The City, with the full concurrence of the Ninth Circuit, has cut short the traditional Title VII analysis, ignored the fact that it sent evidence of validity to the Consent Decree parties sixty (60) days before the examinations, changed the previously published weights after the examination to favor minorities and women, and then, with litigation in ful' bloom and an appeal filed, promoted 120 officers from the (subsequently declared illegal) promotional lists. The Ninth Circuit explored but rejected, as the

only alternative, ousting these 120 appointees from their positions, thereby precluding any other form of relief to the non-minority applicants.

Three members of this Court have voted to grant *certiorari* in a case with identical facts. In *Bushey v. New York State Civil Service Commission,* 469 U.S. 1117, 83 L.Ed.2d 795, 105 S.Ct. 803 (1985), Mr. Justice Rehnquist, joined by Chief Justice Burger and Mr. Justice White, dissented from the decision to deny certiorari and stated:

> All that has happened here is that the State has perceived a statistical disparity in the test results of minority and non-minority applicants, and, at least in part because it fears a lawsuit by minority applicants, it has chosen to do away with that disparity by discriminating against similarly situated non-minority applicants.
>
> I find unpersuasive the Court of Appeals' argument that requiring a judicial determination of discrimination in these cases will undermine Title VII's policy favoring voluntary compliance. Although voluntary compliance is a laudable goal, Members of this Court recognize on other occasions that 'affirmative action' plans must be policed to prevent the practice of discrimination for discrimination sake, (citation omitted) and to protect the interests of innocent third parties (citation omitted). These interests will not be sufficiently protected if agencies charged with discrimination may simply cave in to the allegations without even considering justifications for, or attempt to justify, their original employment decisions, particularly where the allegations are based only upon disparate impact. I therefore disagree with the Court of Appeals' suggestion that it would in any event be sufficient for the State to wait until it is sued and then settle; in these situations the State employer is in a difficult position; it has a duty to act nondiscriminatorily toward both minority and non-minority applicants and its employments decisions must be justified to both sides. States should not be allowed to practice racial discrimination anew under the guise of atoning for past discrimination or because of the difficulties with mounting an otherwise legitimate defense to a lawsuit.

> Thus, even if it were clear that State agencies may engage in this sort of 'affirmative action' in the absence of a finding of discrimination, review here is still warranted to address the circumstances under which this type of 'affirmative action' would be permissible. 83 L.Ed.2d 795, 798.

The Ninth Circuit equated an initial showing of disparate impact with per se invalidity, thus bootstrapping itself a basis for determining that the victims of discrimination had no rights in the first place. But the Court's conclusion that the initial weights were "illegal" or "invalid" is incorrect: the Consent Decree (and the *Federal Guidelines*) are consistent in allowing examinations with adverse impact results to be used so long as the examinations are valid and job-related. At the very least, Petitioners had a right to a showing of validity and, therefore, a right to be promoted from employment lists, after a proper validity analysis had been made by the District Court.

This case presents important questions dealing with employment practices in public agencies other than San Francisco, practices which are unfortunately all-too-often "result oriented" and which go to great lengths to avoid the use of valid, job-related examinations unless the examinations have had no adverse impact on minorities and women.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted, the decision of the Court of Appeals for the Ninth Circuit should be modified, and the case remanded to the District Court for determination of an appropriate remedy for Petitioners.

Respectfully submitted,

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(Appendices follow)

APPENDIX A

In The United States Court Of Appeals

Ninth Circuit
No. 85-2180

San Francisco Police Officers' Association;
Lynn Torres; Lillian Chai Mattoch; Henry Kirk,
Plaintiffs-Appellants,

vs.

City and County of San Francisco
a municipal corporation; Civil Service
Commission; Louis P. Lee; Rev. Dr. Howard S. Gloyd;
Carlota Texidor Del Portillo; Genevieve W. Powell;
A. Lee Munson,
Defendants-Appellees.

Argued and Submitted Sept. 22, 1986.
Decided March 24, 1988.
As Amended March 7, 1989.

This case began in 1973 when Officers for Justice brought suit alleging discrimination based on race and sex in the San Francisco Police Department. The suit as settled with a Consent Decree approved on March 30, 1979. Officers for Justice V. Civil Serv. Comm'n, 473 F.Supp. 801 (N.D.Cal.1979), affd, 688 F.2d 615 (9th Cir.1982), cert. denied, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983). The parties to the decree were the City of San Francisco, the Civil Service Commission, the Officers for Justice, the San Francisco Police Officers Association, and the United States.

The decree required that the City employ good faith efforts to achieve particular goals for the employment of women and minorities in the police department and prohibited the use of methods of selection that had an adverse impact on women and minorities unless the City proved they were valid under the Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. 1607.

The City also promised to:

> Refrain from discriminating at any time on the basis of race, sex, or national origin in hiring, promotion, upgrading, training, assignment, or discharge or otherwise discriminating against an individual employee or applicant for employment with respect to compensation, terms and conditions or privileges of employment because of such individual's race, sex, or national origin.

In 1993 the City gave examinations for promotion to Q-35 Assistant Inspector and Q-50 Sergeant. The examinations were in three parts: a multiple choice test measuring technical knowledge and problem solving; a writing skill test; and an oral test measuring ability to communicate, interpersonal qualities, and supervisory abilities. The Civil Service Commission set weights for the examination components as follows:

	Q-35	Q-50
Multiple choice	45%	41%
Written communications	29%	29%
Oral examination	26%	30%

When the examinations were graded and weighed according to this formula there was a slight adverse impact on women in the Q-35 examination and a substantial adverse impact on minorities in both examinations. The city did not validate the results under the Uniform Guidelines so that under the consent decree no promotion could be based on these examinations.

In June 1984, on the recommendation of the City Attorney, the Commission revised the weights it gave the three parts in such a way that a larger number of minorities ranked in the top group. The Police Officers' Association objected to the use of the revised weights and made the contention that the reweighting was designed to discriminate against individuals on the basis of race. The district court, however, gave summary judgment for the City, and the Officers Association appealed. We initially decided in its favor. We reconsider our judgment on rehearing.

[1] The test itself was not in compliance with the Consent Decree, so the persons who did well on it did not acquire any rights. When, however, the City arbitrarily changed the weighting

and promoted on the basis of this weighting, the City violated the Consent Decree by discriminating on the basis of race and sex. The victims of this discrimination were not the particular officers who had done well under the first weighting, as they had acquired no rights, but the larger group of all the white males who took the test and who were passed over by the discriminatory weighting and subsequent promotions.

[2] One possible relief would be to order the City to discharge those who were illegally promoted and open up the jobs to a new and fair examination. This solution is precluded by the precedents governing equitable relief where there has been discrimination. The beneficiaries of the revision did not cause the City to do what it did. It would be inequitable to penalize them by ousting them from their positions. *United States v. Navajo Freight Lines*, 525 F.2d 1318, 1326 (9th Cir.1975) (per Sneed, J.). The complaint filed by the Officers Association did not seek back pay but the declaratory relief which is here given.

[3] There is no need to tell the City that it should not engage in discriminatory weighting of parts of an examination it has already given and weighted. The City now concedes a Supplemental Order of the district court dated October 27, 1986, "protects against scoring standards being set before examination and then changed after examination." The City's position is a concession that binds it. It is also bound by the order of the district court. It is unnecessary to express the City's obligation in yet another injunction.

No further action is necessary by the district court. The Officers Association may apply for attorney's fees in this court.

REVERSED.

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

No. 85-2180
DC No. C-84-4045 RFP

San Francisco Police Officers'
Association, et al.,
Plaintiffs-Appellants,

vs.

City and County of San Francisco, et al.,
Defendants-Appellees.

April 14, 1989

ORDER

Before MERRILL, WIGGINS and NOONAN, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX C

In the United States Court of Appeals
Ninth Circuit

No. 85-2180

San Francisco Police Officers Association;
Lynn Torres; Lillian Chai Mattoch; Henry Kirk,
Plaintiffs and Respondents,

vs.

City and County of San Francisco
a municipal corporation; Civil Service Commission;
Louis P. Lee; Rev. Dr. Howard S. Gloyd;
Carlota Texidor Del Portillo;
Genevieve W. Powell; A. Lee Munson,
Defendants and Appellees.

(Decided March 24, 1988)

This case began in 1973 when Officers for Justice brought suit alleging discrimination based on race and sex in the San Francisco Police Department. The suit was settled with a Consent Decree approved on March 30, 1979. Officers for Justice v. Civil Serv. Comm'n, 473 F.Supp. 801 (N.D.Cal.1979), aff'd, 688 F.2d 615 (9th Cir.1982), cert. denied, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983). The parties to the decree were the City of San Francisco, the Civil Service Commission, the Officers for Justice, the San Francisco Police Officers Association, and the United States.

The decree required that the City employ good faith efforts to achieve particular goals for the employment of women and minorities in the police department and prohibited the use of methods of selection that had an adverse impact on women and minorities unless the City proved they were valid under the Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. 1607.

The City also promised to:

> Refrain from discriminating at any time on the basis of race, sex, or national origin in hiring, promotion, upgrading, train-

ing, assignment, or discharge or otherwise discriminating against an individual employee or applicant for employment with respect to compensation, terms and conditions or privileges of employment because of such individual's race, sex, or national origin.

In 1983 the City gave examinations for promotion to Q-35 Assistant Inspector and Q-50 Sergeant. The examinations were in three parts: a multiple choice test measuring technical knowledge and problem solving; a writing skill test; and an oral test measuring ability to communicate, interpersonal qualities, and supervisory abilities. The Civil Service Commission set weights for the examination components as follows:

	Q-35	Q-50
Multiple choice	45%	41%
Written communications	29%	29%
Oral examination	26%	30%

When the examinations were graded and weighed according to this formula there was a slight adverse impact on women in the Q-35 examination and a substantial adverse impact on minorities in both examinations. The city did not validate the results under the Uniform Guidelines so that under the consent decree no promotion could be based on these examinations.

In June 1984, on the recommendation of the City Attorney, the Commission revised the weights it gave the three parts in such a way that a larger number of minorities ranked in the top group. The Police Officers' Association objected to the use of the revised weights and made the contention that the reweighting was designed to discriminate against individuals on the basis of race. The district court, however, gave summary judgment for the City, 621 F.Supp. 1225, and the Officers Association appealed. We initially decided in its favor. We reconsider our judgment on rehearing.

This appeal is now moot. Officers have been promoted on the basis of the revised test. These beneficiaries of the revision did not cause the City to do what it did. It would be inequitable to penalize them by ousting them from their positions. *United States v. Navajo Freight Lines*, 525 F.2d 1318, 1326 (9th Cir.1975) (per Sneed, J.). No individual has a right to any particular position

because the original test was not validated under the consent decree. Even an individual who has been the subject of discriminatory practice is not "automatically entitled" to have an incumbent laid off to provide a place. *Firefighters v. Stotts*, 467 U.S. 561, 579, 104 S.Ct. 2576, 2588, 81 L.Ed.2d 483 (1984). Much less is there such entitlement when no particular individual can show injury from the discrimination practiced.

There is no need to tell the City that it should not engage in discriminatory weighting of parts of an examination it has already given and weighted. The City now concedes a Supplemental Order of the district court dated October 27, 1986, "protects against scoring standards being set before examination and then changed after examination." The City's position is a concession that binds it. It is unnecessary to express the City's obligation in another injunction. Our opinion of March 12, 1987, 812 F.2d 1125, is accordingly withdrawn.

DISMISSED AS MOOT.

WIGGINS, Circuit Judge, dissenting:

The opinion holds that the appeal is now moot because the City promises to not again set scoring standards for an examination and then change them after the test is given. In effect, the City recognizes that the rescoring of the examination was wrongful as to those officers who were displaced from the promotional lists by the reweighting. The majority, nevertheless, states that individuals who have suffered from such a discriminatory practice are not "automatically entitled" to relief.

Under Article III, section 2, of the Constitution, the federal courts lack power to decide questions that cannot affect the rights of litigants in the case before them. *De Funis v. Odegaard*, 416 U.S. 312, 316, 94 S.Ct. 1704, 1705, 40 L.Ed.2d 164 (1974) (per curiam). An appeal becomes moot when: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979). Both conditions must be satisfied before it can be said that neither party has a legally cognizable interest in the final determination of the underlying

questions of fact and law. Id. The burden of demonstrating mootness is heavy. *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632-33, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

The City has "voluntarily" promised to not again rescore examinations in the way that it did. As a general rule, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case . . ." Id. at 632, 73 S.Ct. at 897. Whether the City's concession provides sufficient "assurance" that it will not again violate the Title VII rights of its police officers is open to question. Certainly, however, the effects of the City's violation have not been eradicated. The officers who had previously scored in the top group and then were displaced by the reweighting still suffer the effects of the City's discriminatory practice. Their seniority, pay and rank in the Department are still adversely affected by the rescoring. It cannot be said that interim relief or events have completely and irrevocably eradicated the effects of the City's violation. These officers still possess legally cognizable claims for the effects of the City's discriminatory practice as it affected their careers in the Department.

It is unacceptable to me that this court finds a test to be improperly administered to the detriment of specific plaintiffs, but refuses to grant relief. To permit those who have been improperly rewarded to retain their positions is simply renouncing our duty to correct legal errors. Specific plaintiffs have experienced specific wrongs.

Nor is the avoidance of the asserted inequitable result of ousting the incumbent officers from their positions an adequate justification for the majority's action. The majority agrees that the incumbent officers were improperly selected. These improperly selected officers gain no equity by reason of their occupancy of unearned positions. That they were personally uninvolved in wrongfully reweighing the test is irrelevant. The plaintiffs are just as innocent. We should not choose between innocent classes. We should simply order the test to be regiven fairly and accept its results.

APPENDIX D

United States Court of Appeals,
Ninth Circuit.

No. 85-2180.

San Francisco Police Officers' Association et al.,

vs.

City and County of San Francisco, et al.

Argued and Submitted Sept. 22, 1986.
Decided March 12, 1987.

Before MERRILL, WIGGINS and NOONAN, Circuit Judges.

WIGGINS, Circuit Judge:

The Police Officers Association (POA) and three of its members appeal the district court's approval of the procedures followed for the 1983-84 promotion examinations to Police Sergeant (Q-50) and Assistant Inspector (Q-35). The POA challenges the district court's decision to permit the City and County of San Francisco to rescore the promotion examinations in order to comply with its obligations under a Title VII consent decree.

We reverse. We agree with the district court that the examinations as initially weighed were invalid because they had an adverse impact on minorities and women. Rescoring the examinations in order to achieve a specific racial result was, however, improper.

BACKGROUND

The testing resulted from a consent decree entered in consolidated race and sex discrimination actions that the Officers For Justice (OFJ) and the United States brought under 42 U.S.C. §§ 1981 and 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-16, The POA intervened in those actions and, with the City, the Civil Service Commission (the Commission), the United States, and the OFJ, agreed to the consent decree. The district court approved the consent decree on

March 30, 1979, some six years after the plaintiffs filed the initial complaint. *Officers for Justice v. Civil Serv. Comm'n*, 473 F.Supp. 801 (N.D.Cal.1979), *aff'd*, 688 F.2d 615 (9th Cir.1982), *cert. denied*, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983).

The consent decree required that the City employ good faith efforts to achieve particular goals for employment of women and minorities within specified periods of time. The consent decree prohibited the use of selection procedures that had an adverse impact on women and minorities, unless the City proved the procedures were valid under the *Uniform Guidelines on Employee Selection Procedures*, 28 C.F.R. 1607. The consent decree specifically prohibited the City from unlawfully discriminating in any manner on the basis of sex, race, or national origin.

In order to discharge its obligations under the consent decree, the City established a Consent Decree Unit and charged it with developing and administering the promotional examinations. In 1983, the Unit administered the selection procedures for Q-35 Assistant Inspector and Q-50 Sergeant. The promotional examinations had three parts: (1) A multiple choice test to measure technical knowledge and problem solving; (2) a writing skills examination to test the candidates' written communication skills; and (3) a structured oral examination to measure oral communication, interpersonal qualities, and supervisory abilities. The Commission gave each component of the examination at different times during 1983.

At the time the Unit devised the examination procedures, the Commission did not adopt a rating system. The Consent Decree Division Director and the test creator advised against setting the weights of the components until after the Commission administered the examinations and analyzed the results. Acquiescing to the wishes of the POA, however, the Commission established a weighing procedure part-way through the examination process. On September 12, 1983, after the Commission administered the multiple choice component of the examinations, the Commission established the cut-off scores for the multiple choice component and set the weights for all three components. It set the cut-off scores for the multiple choice examinations at 55 percent for the Q-35 Assistant Inspector and 50 percent for the Q-50 Sergeant. These cut-off scores were above the minimum competency level and did not have an adverse impact on minorities. The Commission set the weights for the examination components as follows:

	Q-35	Q-50
Multiple choice	45%	41%
Written communications	29%	29%
Oral examination	26%	30%

After it administered all three components, the Commission informed the parties of the examination results. While it did not reveal the actual identities of the candidates, the Commission ranked them by their assigned examination numbers and specified their race and gender.[1] The candidates taking the examinations fell into the following categories:

	Total	Ethnic Minorities	Women
Q-35	576	148 (25.7%)	59 (10.2%)
Q-50	640	166 (25.9%)	65 (10.2%)

[1] Under Civil Service Commission Rules, the City must keep confidential the identity of candidates before a cut-off score is set.

Based on the September 1983 selection formula, the eligibility statistics were as follows:

	Total	Ethnic Minorities	Women
Q-35	75	6 (8%)	4 (5.3%)
Q-50	125	13 (10.4%)	12 (9.6%)

The percentages represented an adverse impact on minorities in both ranks, and a slight adverse impact on women for the Q-35 Assistant Inspector examination. There was no adverse impact on women for the Q-50 Sergeant examination.

The United States and the OFJ objected to the weighing of the test components because the results demonstrated an adverse impact on minorities and women in violation of the consent decree and Title VII. After discovery, the City Attorney recommended that the Commission revise the cut-off and weighing standards. In June 1984, the Commission agreed and revised the scoring procedures for the examinations.

Under the revised formula, the Commission graded the multiple choice and written communication components of the tests on a pass-fail basis, with 55 percent being the passing grade for Q-35 Assistant Inspector and 50 percent being the cut-off grade for Q-50 Sergeant. It set the passing grade for the written communication component at 60 percent for both Q-35 and Q-50. As a result of the cut-off scores, approximately 200 candidates were eliminated.[2] The multiple choice examination screened out 25 candidates for Sergeant and 23 for Assistant Inspector. The written examination screened out 130 candidates for Sergeant and 160 for Assistant Inspector. Close to 700 candidates took the examinations. The Commission then ranked the oral examinations of those who survived the multiple choice and written examinations in order. The POA objected to the new selection decision, but the grading proceeded on the basis of the revised weights.

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[2] The 200 number takes into account the fact that some candidates competed for both ranks.

There were 45 vacancies for Q-35 and 75 vacancies for Q-50. Using the revised formula, the top applicants were:

Q-35:	30 caucasian males (65.9%)
	10 ethnic minorities (22.29%)
	5 women (11.11%)
Q-50:	46 caucasian males (61.4%)
	18 ethnic minorities (24%)
	11 women (14.6%)

A few days after the Commission adopted the revised formula in June of 1984, the POA filed this action for declaratory and injunctive relief in San Francisco County Superior Court against the City, the Commission and its members. The OFJ later intervened. The defendants removed the case to federal court under the Civil Rights Removal Statute, 28 U.S.C. § 1443(2). Judge Peckham granted a preliminary injunction against the use of the revised formula pending disposition of the action. On March 14, 1985, he granted the City partial summary judgment, holding that Title VII and the consent decree preempted a San Francisco Civil Service rule that required motions for reconsideration to be filed within 30 days of the Commission's action.[3] In May of 1985, Judge Peckham held a fairness hearing to determine if the new formula unnecessarily injured the examination participants.

In June of 1985, Judge Peckham ruled for the City. *City and County of San Francisco v. San Francisco Police Officers Association*, 621 F.Supp. 1221 (N.D.Cal. 1985). He approved the changes in the selection process and also ruled that the procedures were sufficiently fair. The POA appealed. Both this court and the Supreme Court denied a stay pending appeal. Appoint-

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[3] The Commission adopted the revised formula approximately 8 months after it announced the original weights.

ments to the vacancies from the list developed under the revised weights were made in April of 1986 while the appeal was pending.

ANALYSIS

I

Standard of Review

We treat the district court's grant of partial summary judgment as a conclusion of law, which is reviewed de novo. *See Foster v. Arcata Assocs.*, 772 F.2d 1453, 1459 (9th Cir.1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1267, 89 L.Ed.2d 576 (1986). We review the district court's findings of fact under the clearly erroneous standard. *Operating Engineers Pension Trust v. Charles Minor Equip. Rental Inc.*, 766 F.2d 1301, 1303 (9th Cir.1985).

II

Mootness

Under Article III, section 2, of the Constitution, the federal courts lack power to decide questions that cannot affect the rights of litigants in the case before them, *De Funis v. Odegaard*, 416 U.S. 312, 316, 94 S.Ct. 1704, 1705-06, 40 L.Ed.2d 164 (1974) (per curiam). An appeal becomes moot when: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979). The burden of proving mootness is a heavy one. *Id.*

The City contends that this appeal is moot because the City made the 75 Sergeant and 45 Assistant Inspector appointments while this appeal was pending and the lists that the POA seeks to invalidate have expired. The City argues that no decision of this court can alter the rights and obligations of the parties.[4]

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[4] We grant the City's and the POA's motions to augment the record on appeal because the developments described in the declarations

[1] The appeal is not moot. The consent decree remains in effect until March of 1989, and the City intends to weigh future promotional examinations in the same manner objected to here. Thus, the violations alleged by the POA may recur. *See Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 916 (6th Cir.1979).

Furthermore, the appointments and the termination of the lists do not remedy the loss of promotional rights of candidates who claim that reweighing discriminated against them. If reweighing were unlawful, the court could order that a new test be devised, which may result in different candidates being promoted than those currently holding the positions.

The City erroneously relies on *Western Addition Community Organization v. Alioto*, 514 F.2d 542 (9th Cir.), *cert. denied*, 428 U.S. 1014, 96 S.Ct. 446, 46 L.Ed.2d 385 (1975). The order in *Western Addition* provided for a temporary hiring arrangement pending the Commission's execution of an acceptable job-relatedness validation procedure for its written examination. *Id.* at 544. The issue here concerns normal permanent promotions that may recur, rather than a single emergency situation of a nonrecurring nature. Thus, the appeal is not moot.

III

Civil Service Rule 5.07

[2] Section 5.07 of San Francisco's Civil Service Rules provides that a request for reconsideration of a Commission action must be made within thirty days of the Commission's initial decision. The rule's thirty-day time limit is jurisdictional. *See Smith v. City and County of San Francisco*, 11 Cal.App.3d 606, 610, 89 Cal.Rptr. 878, 879 (1970). The OFJ and the United States challenged the validity of the examinations many months after September 12, 1983, when the Commission set the initial weights. The POA contends that the Commission was therefore time-barred from reconsidering its September 12 decision.

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occurred since the taking of this appeal and are relevant to the panel's decision on mootness.

The district court rejected the POA's argument and found that the Commission properly suspended the application of rule 5.07. Because rule 5.07 would impede the operation of the consent decree and would violate Title VII, the district court determined that the court could have suspended the rule's application under the Supremacy Clause. The district court further reasoned that the City also had the power to suspend the rule temporarily because courts generally favor voluntary compliance with Title VII by employers.

The POA argues that rule 5.07 is not void under the Supremacy Clause because it does not conflict with Title VII or the consent decree. The POA points out that the rule itself has nothing to do with employment matters, but is rather a statute of limitations governing the jurisdiction of a local body. The POA argues that the rule does not conflict with the consent decree because the Commission could have acted in a timely manner and that it is only the Commission's lack of diligence that caused the conflict.

[3] Under the Supremacy Clause, any state law that conflicts with federal law or "stands as an obstacle to the accomplishments of the full purposes and objectives of Congress" is void. *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 260, 105 S.Ct. 695, 698, 83 L.Ed.2d 365 (1985). To the extent that a civil service rule conflicts with the operation of a consent decree, it is void under the Supremacy Clause. *Cf. Kirkland v. New York State Dept. of Correctional Serv.*, 711 F.2d 1117, 1132 n. 18 (2d Cir.1983) (court did not consider whether settlement agreement violated state law because state law must yield to federal law in Title VII cases), *cert. denied*, 465 U.S. 1005, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984); *Sarabia*, 601 F.2d at 918 (court determined that district court could suspend civil service rule whose application prevented achievement of consent decree goals); *United States v. City of Chicago*, 549 F.2d 415, 438 (7th Cir.) (insofar as provisions of Illinois Municipal Code as applied violate command of Title VII, their operation must be suspended under Supremacy Clause), *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977). The City properly suspended rule 5.07 because, had the

City complied with the rule, the City would have violated its obligations under the consent decree.

The consent decree specifically forbids the City from using tests or other selection criteria that demonstrate an adverse impact "unless and until" the City proves the procedures are valid under the Uniform Guidelines. Rather than validate a test that had a proven adverse impact on minorities and women, the City chose to revise its testing procedure. The Uniform Guidelines permit employers to use different selection procedures that do not have an adverse impact on minorities and women as an alternative to validating challenged test procedures. *See* 28 C.F.R. § 1607.6A (1986); Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed.Reg. 11,996, 12,001, Question and Answer n. 31 (1979). Not only does the employer have that option, but here it appears that the Uniform Guidelines required the City to throw out the challenged procedure rather than validate it.

In order to validate a selection procedure under the Uniform Guidelines, the employer must consider alternative selection procedures. 29 C.F.R. § 1607.3B (1986). In examining alternatives, the employer should also examine alternative methods of using the selection procedure. 29 C.F.R. § 1607.5G (1986); 43 Fed.Reg. 38,290, 38,291 (1979). For example, an employer may find that a selection procedure that is valid when scored on a pass/fail basis is invalid when used as a ranking device. 29 C.F.R. § 1607.5G (1986). The alternative selection procedure should be used when it has less adverse impact and when the evidence demonstrates that its validity is substantially the same or greater than the challenged procedure. 29 C.F.R. § 1607.3B (1986); 43 Fed.Reg. 11,996, 12,003-04, Questions and Answers Nos. 50-51 (1979).

[4] The City and the POA agree that the components when reweighed are as job-related as they were under the initial weights. The alternative weighing procedure eliminates, however, the test's adverse impact. Therefore, the City could not validate the tests under the Uniform Guidelines, as required by the

consent decree, because an alternative selection procedure existed that was equally job-related but had no adverse impact.[5]

In order to comply with its obligations under the consent decree, the City could not use the initial weights. Rule 5.07 stood as a barrier to the City's ability to revise its testing procedures and, as such, was void under the Supremacy Clause.[6]

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[5] While we find that the Uniform Guidelines permit an employer to choose between validating a selection procedure or developing an alternative selection procedure without an adverse impact, we do not find that the Uniform Guidelines support the Commission's action in this case. The Uniform Guidelines recognize that an employer may take reasonable steps to assure that members of an underutilized protected group are included in the pool of applicants. *See* 29 C.F.R. § 1607.17(3); 43 Fed.Reg. 11,996, 12,001, Question and Answer No. 30 (1979). For the reasons set further below, however, we find that rescoring, rather than readministering the examinations, was unreasonable. The agencies that drafted the guidelines were warned against the use of illegal procedures under the guise of affirmative action. *See* 43 Fed. Reg. 38,290, 38,293 (1978). The agency response to these concerns was that illegal acts purporting to be affirmative action were not the goal of the guidelines and that employee selection procedures must be lawful. *Id.* The Commission's use of the alternative selection procedure was unlawful because it permitted the Commission to manipulate the results of the examinations to produce desired racial and gender percentages. Thus, the Commission's adjustment of scores became the sifting device, rather than the examinations themselves. Administering a new selection device would have achieved the consent decree goals without the appearance of unfairness that resulted from rescoring.

[6]The POA argues that developing an alternative selection procedure, before attempting to validate the challenged procedure, was an action outside the scope of the consent decree. We disagree. Under the consent decree, which incorporates the Uniform Guidelines, the Commission could choose to revamp its selection procedures rather than seek to validate its initial weights. In fact, the validation process requires that the Commission explore such alternative procedures and use them if they have less adverse impact but are equally job-related. *See* 29 C.F.R. § 1607.3B (1986)

IV

Reweighing Examination Components

The critical issue in this case is whether the Commission acted lawfully in reweighing the examination components. The district court viewed this question in terms of fairness and held a fairness hearing in order to determine if the Commission's decision to reweigh was a valid affirmative action plan under *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979).[7]

[5] In *Weber*, the Supreme Court identified four criteria that make an affirmative action plan valid under Title VII: (1) it is designed to break down old patterns of racial segregation and hierarchy; (2) it does not create an absolute bar to the advancement of nonminority employees; (3) it is a temporary measure, "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance"; and (4) it does not unnecessarily trammel the interests of nonminority employees, *Weber*, 443 U.S. at 208, 99 S.Ct. at 2730. *Weber* did not hold that these criteria were absolute requirements, but did hold that these aspects of the plan in *Weber* placed it on the permissible side of the line between permissible and impermissible plans. *Id.* Here, the district court found that reweighing fit all four *Weber* criteria and was therefore

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[7]The concept of a fairness hearing stems from *Bushey v. Civil Serv. Comm'n*, 733 F.2d 220, 229 (2nd Cir.1984), *cert. denied*, 469 U.S. 1117, 105 SA.Ct. 803, 83 L.Ed.2d 795 (1985). *Bushey* concerned the New York State Department of Correctional Services' written examination for Correction Captain. In that case, the state adjusted minority candidates' raw test scores in order to eliminate the examination's adverse impact. The district court granted summary judgment in favor of nonminority candidates for Captain and enjoined the state from using the eligibility list based on the adjusted scores. The court of appeals reversed. The court found, however, that the record was insufficient to determine whether the adjustment of scores trammeled the interests of nonminority candidates under *Weber*. It therefore remanded to the district court for a full exploration of the issue. *Id.* The hearing on remand in *Bushey* is the type of proceeding that the district court conducted in this case.

permissible. We reverse the district court because reweighing the examination unnecessarily trammeled the interests of the nonminority police officers.[8]

In analyzing whether the interests of nonminorities were unnecessarily trammeled, the district court focused on what rights the candidates possessed and how those rights were affected by reweighing. It determined that the City did not overtly take into account race or sex in the decision to reweigh. It then determined that under California law the only right a person on an eligibility list possesses is the right not to be treated arbitrarily or capriciously. Because the Commission retained all three of the original examination components, using two as screening devices and one as a ranking device, and because the oral component seemed capable of judging the three dimensions it was designed to test, the court determined that the Commission had not acted arbitrarily in reweighing the examinations. The district court was careful to state, however, that its holding was not intended to suggest that the new selection process was the best the City could have chosen to promote candidates. Rather, the district court merely approved of the City's action under the arbitrary and capricious standard.

We find that the district court clearly erred when it determined that the decision to reweigh was not a race and gender conscious act. The Commission knew the candidates' race and gender. It also knew how each candidate performed on the individual components before it chose the oral component as the sole ranking device. Using this information, the Commission rescored the examination in a manner that achieved a specific racial and gender result. Race and gender were the deciding factors in determining how the test scoring should be restructured. As a race and gender conscious decision, reweighing must be examined under a standard higher than the arbitrary and capricious standard used by the district court in order to protect the interests of nonminorities under *Weber*.

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[8] The POA also challenges the Commission's actions on equal protection grounds. We need not and do not reach the constitutional issue as we find that reweighing violated Title VII.

An affirmative action plan that is carefully contoured to accomplish the limited objective of reducing disparate impact on minority candidates does not unnecessarily trammel the rights of nonminority candidates. *See Tangren v. Wackenhut Serv.*, 658 F.2d 705, 707 (9th Cir.1981), *cert. denied*, 456 U.S. 916, 102 S.Ct. 1771, 72 L.Ed.2d 175 (1982). "The more closely a plan adheres to its remedial purpose, the less likely it is that the plan will unreasonably infringe upon the interests of other employees." *Johnson v. Transportation Agency*, 770 F.2d 752, 758-59 (9th Cir.1984) (citation omitted), aff'd., ____ U.S. ____, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987). Here, the actions of the Commission could hardly be deemed a carefully contoured affirmative action plan. Rather, reweighing was an ad hoc attempt to achieve a result that the Commission's promotional examinations failed to produce.

Reweighing unlawfully displaced candidates on the basis of their race and gender. The information about the candidates' performance on the individual components led the Commission to choose the oral component as the sole ranking device. If the results of the examinations had been different, the written component or the multiple choice component might have been the new ranking device. Without readministering the test, the Commission examined the results from each component based on race and gender criteria and rescored the test to achieve specific and identified racial and gender percentages. This type of result-oriented scoring is offensive.

Candidates who participate in promotional examinations expect to have an equal opportunity to score well and to achieve promotion. This neutrality cannot exist if the City can rescore the examinations to achieve a particular race and gender balance after it analyzes the results. Permitting an employer to rescore examinations with knowledge of the ultimate results undermines the integrity of the examination process.

Moreover, candidates for promotion should be on notice of how their performance will be evaluated in order to prepare themselves effectively for an examination. Although unintentionally, the Commission misled candidates when it announced the initial weighing system after it administered the multiple choice exami-

nation. Of course, candidates attempt to perform well on all sections of an examination. Yet given limited time and resources, a person will concentrate on the parts of the examination that count the most. Here, the emphasis dramatically shifted from an initial scoring structure in which each component was worth approximately one-third of the entire examination, to a weighing system in which the first two components were mere screening devices and a candidate's rank depended solely on his or her performance on one section of the examination. A test that changes so dramatically after it is administered and the race and gender results are known is no test at all, but is a specious device used to produce whatever result the Commission may choose to achieve.

[6] The plan in *Weber* did not violate Title VII because it did ~~not de~~prive white employees of opportunities for advancement, but rather created additional opportunities by establishing new training programs for both blacks and whites. Here, however, the Commission's decision to reweigh unlawfully restricted the promotional opportunities of nonminority candidates because the tests were scored to achieve a particular racial result. It trammeled the interests of nonminorities, in that the candidates were led to believe that the promotions would be based on merit alone. This harm to nonminorities was unnecessary because a less burdensome alternative, such as administering a new selection procedure, would have better achieved the goals of the consent decree without violating Title VII.

The City was obligated under the consent decree to administer an examination that would not have an adverse effect on minorities and women. When it failed in its first attempt to achieve that goal, the City inappropriately attempted to take short-cuts to meet its obligations. It did so in order to save time. Although we are sympathetic to the City's time dilemma, using an unlawful procedure is not acceptable. The City was required either to validate its initial examination or, if it could not, to devise and

administer an alternative selection procedure that did not have an adverse impact.[9]

The City was additionally obligated under the consent decree not to practice racial or sexual discrimination—no more against white males than against others. The POA was a party to the consent decree. The POA has a right to insist that this unequivocal renunciation of all discrimination means what it says. The reweighing as practiced here violated the consent decree.

We hold that reweighing the promotion examinations after the results of those examinations were known violated Title VII. Therefore the eligibility lists from which the City made the new appointments for Sergeant and Assistant Inspector are invalid. Because the City was unable to validate its initial weighing system, those results must also be discarded. The City must devise and administer a new selection procedure that complies with this opinion. The scoring of the selection procedure must not depend on the actual results of an examination and must adhere to the requirements of the consent decree and Title VII. We remand to the district court in order that it supervise the development of a proper selection device for promotion.

The judgment is REVERSED and REMANDED.

MERRILL, Circuit Judge, dissenting:

I dissent and would leave the parties where they are.

After giving its promotional exam and publishing the initial results, the City of San Francisco was between a rock and a hard place. It could not, consistent with the Consent Decree, use the initial results, which had an adverse impact on black and women officers. But complying with the consent decree seemed unfair to those nonminority officers who had studied hard and thought they had passed the exam, but would be displaced by minority officers.

The court today holds that the City should have given a new test instead of reweighting the three components of the same test. Yet in order to eliminate the adverse impact, the City had to

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[9] To the extent that this opinion conflicts with the result in the Second Circuit case of *Kirkland*, 711 F.2d at 1133, 1134, we decline to follow it.

reduce the number of non-minorities eligible for promotion and increase the number of eligible women and blacks. This affirmative action, mandated by the consent decree, necessarily came at the expense of white male officers. Whether this legal obligation had been accomplished by reweighting or by the giving of a new test, the result would be the same: fewer white males and more blacks and women on the eligibility list. Since the results of the original test were made known, the white males who eventually must surrender their promotions will know they have done so no matter which method is utilized. I see nothing to be gained by putting the city to the expense of a new test.

APPENDIX E

United States Court of Appeals
for the Ninth Circuit

No. 85-2180
DC No. C-84-4045 RFP

San Francisco Police Officers' Association, et al.,
Plaintiffs-Appellants,

vs.

City and County of San Francisco, et al.,
Defendants-Appellees.

August 17, 1987

ORDER

Before: MERRILL, WIGGINS and NOONAN, Circuit Judges

Appellant, San Francisco Police Officers Association, and Appellee, City and County of San Francisco, have filed petitions for rehearing following the opinion of this court, at 812 F.2d 1125 (9th Cir. 1987).

Appellee, City and County of San Francisco, has filed a request for a rehearing en banc from that opinion.

Appellee, City and County of San Francisco, has requested an expedited decision on the pending motions.

IT IS ORDERED that:

1. Each petition for rehearing is hereby denied. The suggestion for rehearing en banc is rejected.

2. The opinion of the court is vacated. The court will file an amended opinion in due course reversing the decision of the district court (Judge Merrill, dissenting), and permitting the incumbent officers to remain in the positions now occupied by them (Judge Wiggins, dissenting).

DATED: August 17, 1987.

CHARLES E. WIGGINS
United States Circuit Judge

APPENDIX F

United States District Court,
N.D. California,

No. C-84-4045 RFP

San Francisco Police Officers Association, et al.,
Plaintiffs,

vs.

City and County of San Francisco, et al.,
Defendants.

June 10, 1985.

MEMORANDUM OF DECISION

PECKHAM, Chief Judge.

INTRODUCTION

During 1983, the City and County of San Francisco (the City), under the auspices of its Consent Decree Unit, administered the selection procedures for Q/35 Assistant Inspector and Q/50 Sergeant. Those procedures, which are the subject of this litigation, included a written multiple choice examination, a written communications examination and a structured oral examination. On September 12, 1983, the Civil Service Commission (CSC) established cut-off scores for the multiple choice examinations and set the weights for all three components of the selection process. On February 7, 1984, the City provided the parties to the Consent Decree with the results in rank order, by race and sex, of the Q/35 and Q/50 selection procedures. Using the weights set by the CSC, the results demonstrated severe adverse impact for minorities in both ranks, and slight adverse impact for women on the Q/35 Assistant Inspector exam.

Because of the adverse impact, the United States and Officers For Justice filed objections under the Consent Decree to the City's use of the results of the Q/35 and Q/50 selection procedures. Extensive negotiations ensued. As a result of these negotiations, the City Attorney recommended to the CSC that it modify

its proposed use of the Q/35 and Q/50 selection process. The Commission then ordered a revised weighing system which substantially eliminated the adverse impact of the selection process. After the CSC's decision, the Consent Decree plaintiffs and the City entered into an agreement withdrawing the plaintiffs' objections to the Q/35 and Q/50 selection process.

On June 7, 1984, the Police Officers Association (POA) and three named plaintiffs filed a complaint in the Superior Court of California which challenged the Civil Service Commission's (CSC) decision to reweigh the Q/35 and Q/50 selection procedures. The defendants, the City and County of San Francisco and the Civil Service Commission, removed the action to federal court under the authority of the Civil Rights Removal Statute. The court denied plaintiffs' motion to remand on December 31, 1984. On that date, the court granted the POA's motion for preliminary injunction, enjoining the City from utilizing the reconsidered weights for the Q/50 and Q/35 examinations until the lawsuit is resolved.

On February 28, 1985, the court granted partial summary judgment in favor of the City and the CSC. The court recognized that the Supremacy Clause and the provisions of the Consent Decree and Title VII authorized the CSC to disregard Civil Service Rule 5.07[1], when faced with the adverse impact resulting from the promotional examinations. After the February 28, 1985 order, the court still has before it the issue of whether the plan chosen by the City was a permissible affirmative action plan within the meaning of *United Steelworkers of America v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2730, 61 L.Ed.2d 480 (1979).

Based on the extensive briefing on all aspects of the ramifications of the City's decision to reweigh the examinations and a hearing on the issue of whether the exams as reweighed unneces-

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[1] Civil Service Rule 5.07 prohibits the CSC from reconsidering matters previously decided by it more than 30 days after notice of the decision of the original vote. Here, the reconsideration vote was taken eight months after the issue had been decided and closed. Under the Supremacy Clause, the civil service rule gave way to the extent it impeded the operation of the Consent Decree.

sarily trammeled the rights of the examinees, the court now holds that the plan adopted by the Civil Service Commission to remedy the adverse impact resulting from the promotional examinations was a permissible affirmative action plan under *Weber*. The court therefore dissolves its preliminary injunction previously issued in this case and orders the City to begin making promotions for the ranks of Assistant Inspector and Sergeant from the eligibility lists derived from the reweighed examinations.

STATEMENT OF FACTS

A. Consent Decree

On March 30, 1979, this court approved a Consent Decree which was entered into as a settlement of a dispute among plaintiffs, Officers For Justice (OFJ) and the United States, defendants, the City and County of San Francisco and the Civil Service Commission, and intervenor, the POA, as to appropriate and valid procedures for the hiring and promotion of police officers for the City and County of San Francisco. The Consent Decree provides for specific, definable and good faith efforts to be made by defendants to achieve certain goals for employment of women and minorities within specified periods of time.

The Consent Decree imposed numerous obligations on the City with respect to the selection of candidates for entry and promotive positions in the San Francisco Police Department (SFPD). Among other things, the Decree prohibited the use of selection procedures which have an adverse impact against minorities and females, unless such procedures have been shown to be valid pursuant to the *Uniform Guidelines on Employee Selection Procedures*, 28 C.F.R. 50.14. Consent Decree at paragraph 4. With respect to the selection of Q/50 Sergeants and Q/35 Assistant Inspectors, the Decree set an annual objective of selecting minorities and females to those positions in proportion to their representation in the qualified applicant pool. *Id.* at paragraph 10(a)(3).

B. The Selection Process

To discharge its obligations under the Decree, the City established a Consent Decree Unit charged with, *inter alia*, the

development and administration of examinations. During 1983, the Consent Decree Unit administered the selection procedures for Q/35 Assistant Inspector and Q/50 Sergeant. Those procedures included a written multiple choice examination, a written communications examination, and a structured oral examination. Each component was designed specifically to measure different dimensions found in the job-analysis to be essential for successful performance as a Sergeant/Assistant Inspector. The multiple choice component was considered the best method for measuring technical knowledge and problem solving. The writing test was designed to test candidates' written communication skills, and the oral test measured oral communication skill, supervisorial skills and interpersonal ability. Each examination component was given at different times during 1983.

On September 12, 1983, after the multiple choice examination had been administered but before administering the two other components, the Civil Service Commission (CSC) established cut-off scores for the multiple choice examinations and set the weights for all three components of the selection process. The cut-off scores for the multiple choice examinations were fixed at 55 percent for the Q/35 and 50 percent for the Q/50. The weights set for the Q/35 procedures were:

Multiple choice examination	45%
Written communication examination	29%
Oral Examination	26%

The weights set for the Q/50 procedures were:

Multiple choice examination	41%
Written communication examination	29%
Oral examination	30%

On February 7, 1984, the City provided the parties to the Consent Decree with the results in rank order, by race and sex, of the Q/35 and Q/50 selection procedures. Using the weights set by the CSC, the top 75 places on the Q/35 eligibility list would have included six (8.0 percent) minorities and four (5.3 percent) females, out of a pool of 26 percent minorities and 10 percent females. The top 125 places on the Q/50 eligibility list would have included thirteen (10.4 percent) minorities and twelve (9.6

percent) females, out of the same pool of minorities and women as in the Q/35. These percentages represent severe adverse impact for minorities in both ranks, and a slight adverse impact for women on the Q/35 Assistant Inspector exam. Women were not affected adversely for Q/50 Sergeant.

C. Objections to the selection process

Because of the adverse impact, the United States and Officers For Justice filed objections under the Consent Decree to the City's use of the results of the Q/35 and Q/50 selection procedures. This court subsequently scheduled a hearing date of June 20, 1984 for consideration of the objections.

Based on discovery conducted after the filing of their objections, the Consent Decree plaintiffs contended that neither the Q/35 nor the Q/50 selection procedures were valid, if used in the manner intended by the City. The primary basis for this contention was the performance of incumbent Inspectors and Sergeants who pretested the Q/35 and Q/50 multiple choice examinations. The Chief of Police and his subordinates had selected these incumbents to pretest the exam because of their superior performance in the police department.Yet, they performed so poorly on the pretest that they would have had no reasonable chance of appointment from the Q/35 and Q/50 rosters.

The court appointed Dr. Joel Lefkowitz, an expert industrial psychologist, to review the selection process. Dr. Lefkowitz reported that insufficient attention was paid to the issue of adverse impact, especially with regard to the use of the multiple choice test and that alternatives which may have minimized such impact were not explored.

D. The decision to reweigh

The evidence uncovered during discovery and the findings of Dr. Lefkowitz prompted extensive settlement negotiations between the Consent Dècree plaintiffs and the City. As a result of these negotiations, the City Attorney recommended to the CSC, in a public session held on May 29, 1984, that it modify its proposed use of the Q/35 and Q/50 selection process. In particular, he recommended that the Commission use the structured oral

examination for ranking purposes and the writing skills and multiple choice exams as pass/fail devices.

In making his recommendation, the City Attorney advised the CSC of the "catastrophic" impact of the selection process on minorities. He explained that this result could not be squared with the Consent Decree, both because the selection process was not "completely valid," and because a "reasonable" alternative weighing system was available which would alleviate the adverse impact. Failure to accept this alternative, he said, would demonstrate lack of "good faith" in facilitating the objectives of the Decree and potentially result in the judicial "set aside" of the entire selection process. He further stressed that reweighing was the only way to settle the plaintiffs' objections short of litigation. *See generally* CSC Transcript (May 29, 1984).

On June 4, 1984, the CSC adopted the City Attorney's recommendation. The Commission ordered a revised weighing system which substantially eliminated the adverse impact of the selection process. Under the revised system, the cut-off scores of 50 percent for the Q/50 and 55 percent for the Q/35 for the multiple choice examination remained the same. A cut-off score was added for the written examination and set at 60 percent. The oral component of the exam was made the sole ranking device. The top 45 appointments from the revised Q/35 eligibility list will include ten (22.2 percent) minorities and five (11.11 percent) females, and the 75 persons appointed from the revised Q/50 eligibility list will include eighteen (24 percent) minorities and eleven (14.6 percent) females.

After the CSC's decision, the Consent Decree plaintiffs and the City entered in an agreement withdrawing the plaintiffs' objections to the Q/35 and Q/50 selection process. This court entered a Stipulation and Order on June 6, 1984 under which it retained jurisdiction "over all issues related to the weighting of the components of the Q/35 and Q/50 selection procedures, the duration of eligibility lists established as a result of those procedures, and the number of persons to be appointed to the Q/35 and Q/50 ranks."

DISCUSSION

The Ninth Circuit in *Johnson v. Transportation Agency*, 748 F.2d 1308, 1311 (9th Cir.1984), extracted four criteria from *United Steelworkers of America v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2730, 61 L.Ed.2d 480 (1979), to aid in determining whether an affirmative action plan is permissible. A plan is permissible if (1) it is designed to break down old patterns of racial segregation and hierarchy; (2) it does not create an absolute bar to the advancement of white employees; (3) it is a temporary measure "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance"; and (4) it does not unnecessarily trammel the interests of white employees. *Johnson*, 748 F.2d at 1311, *citing, Weber*, 443 U.S. at 208, 99 S.Ct. at 2730.

The court will discuss each of these factors to demonstrate that the plan chosen to remedy the adverse impact of the promotional exams meets these criteria.

1. Designed to break old patterns

There is no doubt that the exams were reweighed because of their adverse impact. The decision to reweigh the exams, which results in more minorities being appointed, was designed to meet the requirements of the Consent Decree. This court approved the Consent Decree only after finding that the selection procedures administered by the City for positions within the Police Department had unlawfully discriminated against minorities. *See Officers For Justice v. Civil Service Commission*, 371 F.Supp. 1328 (N.D.Cal.1973). In particular, with respect to the position of sergeant, the court found in 1973 that the City's "prior discriminatory practices had virtually excluded minorities from the rank of sergeant." *Officers For Justice v. Civil Service Commission*, 14 EPD paragraph 7458 at 4715 (N.D.Cal.1977). In the eleven years since this finding was made, the total number of minority sergeants in the Department has increased by only one.

Quite obviously, the decision to reweigh was made in order to break down old patterns of racial segregation and hierarchy in the San Francisco Police Department.

2. Create an absolute bar

The plaintiff in *Johnson* argued that the selection of a woman for the position which he was seeking served as a complete bar to his selection for the position. The Ninth Circuit rejected "this narrow view." 748 F.2d at 1314. The court stated that unless it was "shown a distinct pattern of exclusion of non-minority candidates from such position, [it] cannot conclude that a single employment decision serves as a bar. . . ." *Id.* Certainly, the reweighing of the exams did not create an absolute bar to the advancement of white employees. Any white employee who passed the multiple choice and written components and scored sufficiently high on the oral component of the exam would be entitled to placement on the eligibility list.

The Supreme Court approved the affirmative action plan in Weber, noting that "half of those trained in the program will be white." 443 U.S. at 208, 99 S.Ct. at 2730. Here, white officers do even better than in *Weber* under the revised weights. Not only will 78 percent of the appointments go to white officers, but whites will be appointed at a rate disproportionately high to their representation in the pool of examinees.

Under the facts of this case, there is simply no basis for maintaining that the reweighing "create[s] an absolute bar to the advancement of white employees."

3. Temporary measure

In *Johnson*, the court found that the plan was temporary because "[i]mplicit in the plan is the intent to stop taking sex into account once the long-range percentage goals are attained." 748 F.2d at 1313. Likewise, with the instant plan, neither sex nor race will be taken into account once the City administers an exam that does not result in adverse impact. The reweighing plan is limited to removing imbalance in a single set of examinations. New examinations with their own weights will be used for future promotions. Moreover, the adverse impact resulting from a promotional exam presumably will not require remedial action once the long-range percentage goals of the Consent Decree are reached.

4. Rights unnecessarily trammeled

The Ninth Circuit in *Johnson* summarily concluded that "[u]nless we are shown a distinct pattern of exclusion of nonminority candidates from such positions, we cannot concluded that a single employment decision serves as a bar or unnecessarily trammels the interests of other employees. The record contains no evidence of such a pattern in this case." 748 F.2d at 1314.

The opposite result was reached by the district court in *Hammon v. Barry*, 606 F.Supp. 1082 (D.D.C.1985). There, the court found that the plan sought to deprive white firefighters of a legitimate and longstanding expectation of an equal opportunity to advance into the supervisory ranks, an opportunity they had earned by serving the requisite minimum of five years in the department and scoring well on the promotional examination. According to the court, "the fact of past discrimination alone is not enough to deprive innocent whites of their legitimate expectation of advancement." It concluded that because the plan made race a mandatory consideration over merit, it unnecessarily trammeled the interests of white firefighters.

Both of these cases are distinguishable from the case at hand. Neither race nor sex was considered before merit under the reweighing plan. In fact, neither race nor sex was overtly taken into account in making up the new eligibility lists. Nonminorities were not deprived of a legitimate expectation of advancement. Instead, minorities and nonminorities alike were advanced in a manner that had not been originally contemplated. The real issue is whether the City could "change the rules after the game had started"[2] without trammeling the rights of the examinees.

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[2] It is imprecise to imply that the rules were changed after the examinations were given. First, the candidates took the multiple choice examination before any weights had been assigned to the various components. Second, job announcements for both the Q/50 and Q/35 noted that "[t]he Consent Decree Division reserves the right to revise the examination plan in order to meet the requirements of applicable law and the Consent Decree." The Consent Decree Division merely asserted its reserved right.

The City claims that since being on an eligible list affords no right to an appointment, the candidates have no right which is being trammeled. Similarly, in *Kirkland v. N.Y. State Dept. of Correctional Services*, 711 F.2d 1117, 1134 (2d Cir.1983), the Second Circuit found that under New York state law a person on an eligibility list does not possess "any mandated right to appointment or any other legally protectible interest."

The Second Circuit, however, further stated that "[t]he only relevant state right intervenors possess is the right to challenge the settlement on the grounds that the manner in which it provides for appointments is unlawful, arbitrary, and capricious or constitutes an abuse of discretion . . . This right intervenors exercised in the district court." *Kirkland*, 711 F.2d at 1134. The *Kirkland* court cited two New York state cases for this proposition. In *Adelman v. Bahou*, 85 A.D.2d 862, 446 N.Y.S.2d 500 (1981), petitioners sought upward reclassifications of their positions without examination. The court stated that it could not overturn a commission's determination unless it was without a rational basis. And, in *Burke v. Sugarman*, 35 N.Y.2d 39 (1974), the Court of Appeals held that persons who pass an examination and are on an eligible list have standing to challenge unlawful appointments or designations to positions for which the list has been established.

California recognizes a similar right. In *Fuchs v. Los Angeles County Civil Service Com'n*, 34 Cal.App.3d 709, 715, 110 Cal.Rptr. 311 (1973), the court stated that "[b]oth the petitioner and the public have an interest in ensuring that the best selection procedures are used in determining the advancement of public employees to positions of increased responsibility and authority." Fuchs had filed his action attempting to cancel the list of eligible candidates for the position of head deputy district attorney and to void any appointment to that position made from the list of eligible candidates. He claimed that parts of the examination weighed factors not relevant to a determination of qualifications for head district attorney. He further contended that his oral interview was not conducted fairly. The court found that there was no indication that the Commission or the director of personnel acted *arbitrarily or unfairly*, within the established frame-

work, to deprive the petitioner of his promotional opportunity. *Id.* at 716, 110 Cal. Rptr. 311 (emphasis added).

In *Almassy v. L.A. County Civil Service Com.*, 34 Cal.2d 387, 210 P.2d 503 (1949), the petitioner sought a writ of mandate to compel the Los Angeles County Civil Service Commission to annul two promotional civil service examinations and their corresponding eligibility lists. The California Supreme Court recognized that the civil service commission has been given broad discretionary powers in determining the subjects of examination and the qualifications which are to be measured. The court stated that "[j]udicial interference under such circumstances is unjustified except on a showing of arbitrary, fraudulent, or capricious conduct, or a clear abuse of discretion." 34 Cal.2d at 396, 210 P.2d 503. No such showing was made in the case.

These two cases make clear that California recognizes the right of an examinee to challenge the promotional examinations if the Civil Service Commission has acted arbitrarily, capriciously, or unfairly in depriving the examinees of their promotional opportunities. If the exams as reweighed were not capable of fully measuring the qualifications needed to be an assistant inspector or a sergeant, then the Commission acted arbitrarily when it decided to use the oral component as the sole ranking device. If the Commission acted arbitrarily, capriciously, or unfairly in deciding to use the oral component of the exam as the sole ranking device, then *a fortiori* the rights of the examinees have been unnecessarily trammeled.

The court therefore set a hearing to determine if the CSC's decision to reweigh the examinations was arbitrary and capricious.[3] The testimony received during the hearing establishes that

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[3] This was the only factual issue before the court. The POA originally had included a state claim alleging that the examinations, as reweighed, were not job-related. During oral argument on the motion for partial summary judgment, the court asked Mr. Saltsman, Counsel for POA: "Do you have a pendant claim that you are wanting to prosecute on the issue of job validity?" Answer: "No, Your Honor." (R.T. February 28, 1985.) The POA therefore has withdrawn the issue of whether the examinations, as reweighed, were job-related.

the decision of the CSC was neither arbitrary nor capricious, nor was it an abuse of discretion.[4]

As a preliminary matter, the displacement of candidates from the eligibility lists does not constitute arbitrary action. Once this court recognized that the City had the right to take some action to remedy voluntarily the adverse impact stemming from the originally-weighted examinations, it became clear that the original eligibility lists could not be used. Thus, no matter what remedy the City chose, the rankings on the eligibility lists would change. By reweighing the examinations, the City salvaged the examinations and saved considerable time that would have been lost if new examinations had been constructed. Although displacement in great numbers occurred, displacement may have been considerably less than what would have resulted from new examinations.

At the hearing, the court heard testimony from four witnesses: two "raters"[5] of the oral component, Professor Andrew L. Comrey, a professor of psychology at the University of California, Los Angeles, and Raymond Wong, the Consent Decree Coordinator. The testimony from the witnesses established the following facts.

First, although the examinations were reweighed, all three components of the examinations were maintained. Cut-off scores originally set for the multiple choice component, the section which tested technical knowledge, remained the same. Those candidates for sergeant and assistant inspector who did not receive minimum scores of 50 and 55 percent, respectively, were not permitted to take the other two examinations. The cut-off scores were set approximately five points above the level of minimum competency. Twenty-five (25) Q/50 applicants and 23

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[4] The court has reviewed the transcripts of the hearings before the Civil Service Commission and has found that most, if not all, of the evidence received during the court's hearing also was before the CSC.

[5] Lieutenant Gabriel Ornelias and Captain Edward Washington of the Los Angeles Police Department testified in court. In addition, the court received into evidence the deposition testimony of Captain Patrick Devlin of the New York Police Department.

Q/35 applicants[6] were screened out because of their failure to "pass" the multiple choice examination. Second, the writing skills component, which was designed to test a candidate's ability to communicate effectively in writing, also was established as a screening device. A standard score of 60 was set for the writing skills examination which resulted in 130 candidates for the Q/50 and 160 candidates for the Q/35 being eliminated from consideration.[7]

Finally, the oral component was established as the sole ranking device. The oral examination consisted of a structured oral interview in two parts: (1) a ten minute presentation on a topic area reflecting the department's operating procedures and policies; and (2) one to three scenarios followed by questions from the raters. The ten-minute presentation focused on one of eight topics drawn from the SFPD's general orders and measured a candidate's oral communication and supervisorial skills. A five-minute question period followed the presentation. The scenarios, developed by subject matter experts, were designed to simulate situations which might be encountered typically by a sergeant or assistant inspector in his/her day-to-day work. The scenarios measured interpersonal skills.

Following the reading of the scenario, the raters[8] asked the candidates pre-designated, probing questions and were not permitted to ask follow-up questions. Both Lieutenant Ornelias and

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[6] The POA contends that the multiple choice component should have been accorded greater weight in the selection process. In this regard, the court notes that the multiple choice examination tested knowledge of the codes that the candidates had been enforcing for the past three years. Perhaps then, it is unsurprising that the great majority of candidates exceeded the level of minimum competency.

[7] Three candidates who were on the original eligibility list did not make the revised list because they failed the written communications test.

[8] Each interview board consisted of three raters who were not members of the San Francisco Police Department. The raters were specifically chosen from other jurisdictions in order to eliminate favoritism and bias from the selection process.

Captain Washington, two of the raters during the oral component, complained about the tightly-structured[9] format of the oral interview. They indicated that they had follow-up questions that they would have liked to ask the candidates. However, Professor Comrey, the POA's own expert witness, testified that the structured interview was more objective and enhanced the reliability of the examination.[10]

Thus, although the oral component originally was not intended to be the only ranking device, the evidence demonstrates that the oral component is capable of performing this purpose. Much more was tested via the oral interview than speaking ability. As mentioned, the oral component fairly measured supervisorial skills, oral communication skills and interpersonal skills. These were three of the five dimensions or skills and abilities identified by the job analysis as important in the successful performance of the job as both Assistant Inspector and Sergeant. The other two dimen-

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[9] The entire oral examination was highly structured. The raters were told precisely which dimensions were being measured and the method by which a candidate would exhibit that dimension. The Consent Decree Examination Unit developed a "Rater's Report Form" which defined the dimensions for each classification, explained the scoring scale, and provided a framework upon which the raters could base their judgment as to whether a response was unsatisfactory, satisfactory, or good, relative to the specific dimension that was being measured. The raters were given these forms and encouraged to use them. Moreover, an eight-hour orientation and training program for the oral raters increased the chances that the raters would be consistent and accurate in their grading of the candidates.

[10] Professor Comrey also testified that, if the oral interview were to be used as the sole ranking device, at least 70 percent of the applicants should be eliminated on the basis of the first two components. The court does not accept his opinion for three reasons. First, as a general matter, Professor Comrey's expertise was in psychological testing and not employment testing. Second, and more specifically, he had never seen the data underlying the job analysis, had never read the scenarios, had not seen the tests and had not read the instructions to the raters. Finally, although he stated that an oral interview is unreliable and lacking in validity, some of the specific reasons he gave to support his statement were not applicable to this particular oral examination.

sions for the position of Q/50 and Q/35 were technical knowledge, which was tested through the multiple choice examination, and writing skills, which obviously was tested during the written examination.

After hearing all of the testimony and reading all of the evidence, this court believes that the promotional examination process was carefully designed and administered. The City met its dual goals of insuring a credible selection process and erasing the adverse impact resulting from the originally-weighed examinations. The court concludes that the CSC did not act unfairly, capriciously, nor arbitrarily in reweighing the examinations, especially since (1) the multiple choice cut-off score was set above the level of minimum competency; (2) a cut-off score was established for the writing skills component, thereby weeding out those candidates who could not communicate effectively in writing; and (3) the structured oral examination seemed to be a full, fair and credible manner of judging the three dimensions designed to be tested by the oral component.

The court, by its holding, in no way suggests that the selection process was the "best" manner the City could have used to promote candidates to the ranks of assistant inspector and sergeant. Rather, in reviewing the actions of the City and the CSC, the court merely approves the defendants' actions under an arbitrary and capricious standard. Therefore, the court finds that the rights of the examinees were not unnecessarily trammeled in the reweighing of the examinations.

Pursuant to Fed.R.Civ.P. 52(a), this Memorandum of Decision shall represent the court's findings of fact and conclusions of law.

CONCLUSION

The court holds that the reweighing plan adopted by the Civil Service Commission to remedy the adverse impact resulting from the promotional examinations was a permissible affirmative action plan under *Weber*. The court therefore dissolves its preliminary injunction previously issued in this case and orders the City to begin making promotions for the ranks of assistant inspector and sergeant from the eligibility lists derived from the reweighed examinations.

Let judgment be entered accordingly.

APPENDIX G

United States District Court,
N.D. California.

No. C-84-4045 RFP.

CITY & COUNTY OF SAN FRANCISCO, et al.,
Plaintiffs,

vs.

SAN FRANCISCO POLICE OFFICERS ASSOCIATION, et al.,
Defendants.

March 14, 1985.

MEMORANDUM

PECKHAM, Chief Judge.

INTRODUCTION

On February 28, 1985, this court heard oral argument on the issue of whether the Supremacy Clause, and the provisions of the Consent Decree and Title VII, authorized the Civil Service Commission (CSC) to violate Civil Service rule 5.07, when faced with the adverse impact resulting from the promotional examinations. The court granted partial summary judgment on this issue in favor of the City and County of San Francisco (the City) and the CSC. The court in this Memorandum sets forth the reasons for its order granting partial summary judgment.

The facts pertaining to the issue discussed below were set forth in detail in the court's Memorandum and Order of December 31, 1984, which held that the removal of this case was proper and preliminarily enjoined the City from using the revised weighting system for the Q/50 and Q/35 examinations. Therefore, the court does not find it necessary to restate the facts in this Memorandum.

LEGAL ANALYSIS

Civil Service rule 5.07 prohibits the CSC from reconsidering matters previously decided by it more than 30 days after notice of the decision of the original vote. The POA, therefore, claims that the CSC did not have the power to change the weights in the manner in which it did—by a reconsideration vote taken on an issue which had been decided and closed eight months earlier. The POA contends that, if the September 12 weights were invalid, the CSC should have explicitly passed an exception rule to cover this one matter or promulgated a new rule covering examinations which are given to effectuate federal Consent Decrees.

In *Smith v. City and County of San Francisco*, 11 Cal.App.3d 606, 89 Cal.Rptr. 878 (lst Dist. 1970), a licensed vocational nurse appealed her discharge from her position to the CSC. The Commission affirmed the discharge. In affirming the trial court's decision denying her petition for a writ of mandate to compel the Commission to reopen her appeal, the court of appeal stated that "[b]y its order, the jurisdiction of the commission over the matter ceased, and it may not of its own volition reopen the matter." *Id.* at 610, 89 Cal. Rptr. at 879.

The POA maintains that Smith bars the CSC from reopening or revoting a matter of its own volition. Therefore, once the CSC's September 12, 1983 vote became final, the CSC lost jurisdiction over the weighting of the exam components.

The City formulates the issues in the case somewhat differently. According to it, the central issues are whether the Q/50 and Q/35 examinations were valid under federal law and whether the parties were obligated to assure compliance with the promotional goals of the Consent Decree. The City easily distinguishes Smith because conflicting provisions of federal law and state law were not involved in that case. The City's decision to reweight the exams was a result of the perceived violation of the commands of Title VII and the Consent Decree. This perceived violation invokes the Supremacy Clause.

(1) The Supremacy Clause provides that "[t]his Constitution and the Laws of the United States which shall be made in

Pursuance thereof . . . shall be the Supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, Art. VI, cl. 2. Thus, a state law which conflicts with federal law or "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" is void under the Supremacy Clause. *Lawrence County v. Lead-Deadwood School District*, ____ U.S. ____, 105 S.Ct. 695) 698 (1985).

In *United States v. City of Chicago*, 549 F.2d 415, 438 (7th Cir.), *cert. denied,* 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977), the court recognized that the application of Illinois Municipal Code provisions had to be suspended under the Supremacy Clause to the extent that the provisions violated the command of Title VII. The Seventh Circuit then warned the district court that, despite the conflict of state law with federal civil rights legislation, the district court did not have an unbridled license to replace the state's method for selecting police officers with its own. "When a state statute is assailed because of alleged conflict with a federal law, the same considerations of forbearance, the same regard for the lawmaking power of States, should guide the judicial judgment as when this Court is asked to declare a statute unconstitutional outright." *Id.,* quoting *Farmers Union v. WDAY, Inc.*, 360 U.S. 525, 546, 79 S.Ct. 1302, 1314, 3 L.Ed.2d 1407 (1959) (Frankfurter, J. dissenting).

The court in *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 918 (6th Cir.1979), was faced with a civil service rule that conflicted with the stated goal of a consent decree. The goal of the decree was to attract sufficient numbers of minority applicants to the Toledo police force so that within five years the ratio of minorities within the force would reasonably reflect the ratio of each minority group to the total population of the city. The Division of Police had traditionally followed "rule of three" which required the civil service commission to certify the names of the three candidates standing highest on the eligibility list for each position to be filled. The appointments were then made from the group of three. The district court suspended the rule of three and directed the city defendants to certify for appointment the names of all black applicants who had passed the last examina-

tion, without regard to their positions on the eligibility list. The district court stated that the only effect of its order was to suspend the civil service rule to the extent it impeded the operation of the consent decree. The Sixth Circuit, in affirming, construed the order as merely expanding the eligibility list. The additional eligible applicants did not replace or "bump" an otherwise eligible white applicant, *Id.*, at 919.

[2] Pursuant to the Supremacy Clause, it appears that this court also could have suspended application of civil service rule 5.07 to the extent it impeded the operation of the Consent Decree. The Consent Decree states that:

> [t]he city shall . . . make no further use of tests or other selection qualifications, standards or procedures for hiring or promotion within the San Francisco Police Department . . . which have a disproportionately adverse impact against minorities or females, unless and until such standards have been shown to be valid, pursuant to the *Uniform Guidelines on Employee Selection Procedures*, 43 Fed. Reg. 38290, August 25, 1978, or any superseding federal guidelines.

Consent Decree at paragraph 4. The Consent Decree specifically forbids the City from using the tests or other selection qualifications which demonstrated adverse impact "unless and until" they have been shown to be valid. The City believed that the examinations as weighted were invalid. Therefore, if it continued to use them, it would be in direct violation of the Consent Decree.

[3] Both *City of Chicago* and *Sarabia* concerned the authority of the district court to suspend the application of state or local law. In the case at hand, the City itself, when faced with the conflict between state law and the goals of the Consent Decree, voluntarily suspended the application of civil service rule 5.07. The courts generally favor voluntary compliance on the part of an employer faced with a prima facie showing of adverse impact as the "preferred means" of eliminating employment discrimination. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017-18, 39 L.Ed.2d 147 (1974); *Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 228 (2d Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 803, 83 L.Ed.2d 795 (Janu-

ary 8, 1985). The court must explore whether the City had the right to violate a civil service rule in taking steps to eliminate voluntarily the adverse impact resulting from the Q/50 and Q/35 examinations.

That issue was summarily dealt with by the Second Circuit in *Kirkland v. New York State Dep't of Correctional Services*, 711 F.2d 1117 (2d Cir.1983), *cert. denied*, 465 U.S. 1005, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984). In *Kirkland*, minority Corrections Sergeants in the New York State Department of Correctional Services brought a class action alleging that promotional examinations' resulting eligibility lists were racially discriminatory in violation of Title VII. The district court approved the parties' settlement, and the intervenors challenged the district court's order of approval. The intervenors contended that the proposed settlement violated both the New York Constitution and the state civil service law by departing from the principle that promotions in the state civil service were to be made by competitive examination. *See* 552 F.Supp. 667, 675 (S.D.N.Y. 1982). The Second Circuit refused to even consider these objections, stating that "[b]ecause state law must yield to federal law in Title VII cases (citations omitted), we need not consider whether the settlement agreement violates state law." 711 F.2d at 1132 n. 18.

The Second Circuit again emphasized Title VII's preference for voluntary compliance in *Bushey v. New York State Civil Service Commission*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 803, 83 L.Ed.2d 795 (1985). There, the court held that a showing of a prima facie case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for employer-initiated voluntary race-conscious remedies. The dispute in *Bushey* centered on promotional examinations for the position of Correction Captain in New York's Correctional Services. After administering the test, the Civil Service tabulated each candidates' right and wrong answers to arrive at the candidates' raw scores. The tabulation results indicated that the passing rate of minority candidates was approximately fifty percent lower than the passing rate of nonminority candidates. Under the 80 percent rule, the

State determined that the Captains' exam had an adverse racial impact. The State then adjusted both the minority and nonminority candidates' scores by converting them to separate frequency distributions and then equating or normalizing them with the respective means. The effect was to increase to fifty percent the percentage of minorities who passed the test. In practical terms, the adjustment added eight minority candidates to the eligibility list without removing any of the 119 nonminorities from the list.

By acting to eliminate the perceived adverse impact of the examination on minorities, the State anticipatorily sought to avoid litigation it assumed minority candidates would bring. The nonminorities, however, brought suit, contending that the State's adjustment of candidates' raw scores involved "reverse discrimination" in violation of Title VII. The nonminorities challenged the adjustment of test scores which occurred without a prior judicial finding that the test was not valid.

The Second Circuit, in reversing the trial court, held that a prima facie showing of adverse impact in a selection process creates a sufficiently serious claim of discrimination so as to permit an employer to take voluntary remedial measures to eliminate that impact. *Id.* at 228. The court further held that a judicial determination that the prima facie case was not rebuttable through job-related explanations is neither required nor appropriate. *Id.* at 226.

The court reasoned that Title VII's preference for voluntary compliance would be seriously undermined if an employer were required to postpone settling a Title VII testing case pending a judicial determination of the test's validity. *Id.* at 227.

[4,5] The Second Circuit's decisions make clear that there is a strong preference for voluntary compliance as the means of eliminating employment discrimination. Civil service rule 5.07 stood as an obstacle to the accomplishment of the objectives of Title VII. This court certainly had the right to order the CSC to reconsider its initial vote. Given the preference for voluntarily compliance with Title VII, the City also had the right to suspend temporarily the application of Civil Service rule 5.07 when it was

faced with supposedly-invalid promotional examinations demonstrating adverse impact. Thus, under the Supremacy Clause, the civil service rule had to give way to the extent it impeded operation of the Consent Decree.

The court therefore granted partial summary judgment in favor of the City and County of San Francisco and the Civil Service Commission.

APPENDIX H

In the United States District Court
Northern District of California
Nos. C-73-0657 RFP & C-77-2894 RFP

The Officers For Justice, et al.,
Plaintiffs,

vs.

The Civil Service Commission of
the City and County of San Francisco, et al.,
Defendants.

United States of America,
Plaintiffs,

vs.

The City and County of San Francisco, et al.,
Defendants.

(Filed March 30, 1979)

ORDER

PECKHAM, Chief Judge.

This court is now asked to approve a settlement agreement reached by all parties in this case. The proposal represents the culmination of almost six years of litigation that included several preliminary injunctions and orders, a settlement tentatively agreed to that eventually collapsed, and two weeks of actual trial before a recess that led to weeks of hard bargaining by all the parties that produced this final agreement. As we have stated on numerous previous occasions, this suit involves issues of extraordinary sensitivity and importance to the parties who have brought it and to the members of minority groups that they represent, to the incumbent members of the San Francisco Police Department, to the governing bodies and institutions of San Francisco and their members, and to the entire community of this City.

In considering the merits of this proposed decree, we are mindful not only of the favored status of settlements in Title VII

litigation, but also the advantages to the parties and the community offered by a consensual resolution of this lawsuit—the avoidance of a long, public and divisive trial of the Police Department and related City institutions and their members, with an outcome potentially involving court-imposed remedies uncomfortable for all and popular with no one. We have considered formal objections filed in response to the court's public notice of a proposed settlement. We discuss below those submissions—one filed by a group of sergeants in the department who protest the decree's effects on their rights and standing, and another filed by a named plaintiff who contends that the decree provides inadequate redress and prospective relief. In short, we have attempted to consider the interests of everyone touched by the proposed settlement of this suit, as well as the facts already established and the relevant law.

History of the Case

A brief historical summary of this litigation will give a proper perspective on the task at hand. In 1973, the private plaintiffs, including individual victims of discrimination and organizations representative of the interests of various minority groups in San Francisco, brought suit against the San Francisco Civil Service Commission, the Police Commission of San Francisco, and the Chief of the San Francisco Police Department, charging racial and sexual discrimination in the employment practices of the department. The San Francisco Police Officers Association (POA) intervened as defendants. In November of 1973 this court issued a preliminary injunction barring the use of discriminatory entrance and sergeant's promotional examinations and imposing a quota of three minority applicants for every two nonminority applicants in hiring patrol officers and a quota of one-for-one in permanent promotions to sergeant. 371 F.Supp. 1328 (N.D. Cal.1973). In 1975 we enjoined the use of the 5'6" minimum height requirement for Q-2 patrol officers, imposed a temporary quota for hiring women to Q-2 positions, and ordered that the physical agility test be scored and weighed so as not to discriminate against women applicants. By then a new Q-2 exam had been developed whose overall impact on minorities was acceptable, so the three-for-two entry level quota was dissolved. 395

F.Supp.378 (N.D.Cal.1975). In 1977 the one-for-one quota was extended to the temporary appointment of sergeants. 14 E.P.D. 7548 (N.D.Cal.1977). However, the U.S. Court of Appeals for the Ninth Circuit stayed that order pending its appeal. The use of a discriminatory Q-35 assistant inspector's exam was enjoined. 14 E.P.D.7549 (N.D.Cal.1977). The United States also sued the City for discriminatory employment practices in 1977, and its suit was consolidated with the private plaintiffs' suit. In the spring of 1978 the public and private plaintiffs and counsel for the City reached a tentative settlement. However, the POA vigorously opposed it and a majority of the Board of Supervisors of the City refused to approve it. In September 1978 we granted the government's motion for partial summary judgment with respect to entry-level examinations given in 1969-72 and the Q-50 sergeant's exam given in 1971. The use of these exams was held to violate Title VII of the Civil Rights Act of 1964, the State and Local Fiscal Assistance Act of 1972, and the Omnibus Crime Control and Safe Streets Act of 1968. Trial of the race discrimination issues commenced in November 1978 and recessed after two weeks for further settlement negotiations which eventually produced the instant proposal filed with the court on January 25, 1979. Notice of the proposed settlement was sent to all identifiable members of the class and published in various newspapers. A hearing on the fairness of the proposed consent decree was held on March 5, 1979, and the proposal and objections to it were taken under submission.

Because this settlement was reached after but two weeks of trial, complete findings of fact and conclusions of law were not made, but that does not mean that what went on before is without significance in considering approval of this consent decree. The long history of this litigation includes various evidentiary hearings, stipulations, and findings and conclusions previously made by this court, and it forms an essential part of the record upon which this court must make its decision. We summarize some of its essential aspects.

(1) The ethnic composition of the San Francisco Police Department at the outset and throughout this litigation differed significantly from the ethnic make-up of the City and County of

San Francisco. Blacks, Hispanics and Asians were and continue to be substantially underrepresented. This disparity is even more pronounced in the upper ranks of the department—assistant inspector, sergeant and above. Written examinations for the selection of patrol officers and for promotions to sergeant that were administered from 1969 to 1972 displayed a substantial adverse statistical impact on minorities who took them. The job-relatedness of these exams was not established, and their use constitutes a violation of section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a).

(2) The 5'6" pre-selection minimum height requirement that was used by the City unit enjoined by this court also impacts adversely on Hispanics, Asians and women. As such it presents a prima facie case of employment discrimination, unrebutted by defendants in this action.

Before the filing of this action, women were totally excluded from the position of patrol officer in the San Francisco Police Department, and Q-20 policewomen were not eligible for promotion to the rank of sergeant or higher. The physical agility test that was administered to applicants when the position of Q-2 patrol officer was opened to women had a very significant adverse impact on women. The City was unable to establish the validity of this test during this litigation, and its use was modified by an order of this court.

We also note the adverse statistical impact on Blacks that the 1976 Q-35 assistant inspector's promotional examination displayed. Although the number of minority officers taking that exam was too small to establish a prima facie case of discrimination based on statistics alone, indications of discriminatory impact were serious enough to justify an injunction against its use in making permanent promotions to that rank.

Finally we offer the observation that during the course of this litigation, including the opening days of its trial that occurred before this settlement was reached, substantial evidence of intentional discrimination was presented to this court.

Objections

[3] A group of police officers currently holding the permanent rank of sergeant in the San Francisco Police Department have objected to the proposed consent decree and have moved to intervene in this lawsuit. They claim that the decree violates their rights under the San Francisco City Charter to have a lieutenant's promotional examination given every four years. They further claim that the decree deprives them of vested seniority rights and their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and under 42 U.S.C. §§ 1981 and 1983. Although we have denied their application to intervene in this action, the objections and interests as third parties potentially affected by the operation of the proposed decree are relevant and necessary considerations in our decision on whether to approve this settlement. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, at 371-76, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d &32, at 837 (9th Cir. 1976).

[4] The last lieutenant's exam was given in 1972, as the City on its own initiative chose not to administer another one during the pendency of this litigation. Under the terms of the proposed decree, the next lieutenant's exam will be given when all persons promoted from the 1976 sergeant's exam roster are eligible to take it. That may be as early as 1981, but it will be no later than July 1982. The sergeants protest further delay, especially in light of the fact that the decree imposes no delay on sergeant's and captain's promotional exams. The sergeants also protest the impact of the proposed settlement remedies on their seniority rights. The present seniority system provides that up to 15 percent of a candidate's competitive standing on promotional exams may be derived from seniority credits. On the sergeant's exam, one percent for every year of service within the department is counted, up to a maximum of 15 years (15 percent). On the lieutenant's exam, 0.6 percent of every year of departmental service is counted, up to a maximum of 15 years (9 percent), and 0.6 percent for every year of service as a sergeant is counted, up to a maximum of 10 years (6 percent). On the captain's exam, 0.45 percent per year of service in the department, up to 20 years

maximum (9 percent), and 0.6 percent per year of service as a lieutenant, up to 10 years maximum (6 percent), is counted.[1] To be eligible to take an exam, an applicant must have completed a probationary period in the rank immediately below that to which he is applying—one year as a patrol officer and six months in upper ranks.

This contrasts with the promotion system prescribed in the proposed consent decree. For the first five years under the decree, no seniority credits shall be granted on promotional exams. Thereafter, for the remaining five years of the decree, the City may grant seniority credit counting up to five percent of a candidate's competitive standing for promotion. Candidates may be granted one and two-thirds percent credit for each year served in the rank from which promotion is sought. Hence a maximum of three years of service in rank may be counted. The decree also provides that officers must spend more time in rank before being eligible to take a promotion exam than is required under the present system. Applicants for promotion to the ranks of sergeant and assistant inspector must serve three years in the department to be eligible to take those exams. Applicants for promotion to lieutenant and captain must serve two years as sergeants and lieutenants, respectively, to be eligible for those exams.[2]

In response to these objections, we initially emphasize that the proposed decree is a negotiated settlement agreement that in-

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[1] Therefore, since the last sergeant's exam from which permanent appointments were made was given in 1971, and since the last such appointments were made in 1974, all present sergeants would qualify for at least 11 years of service credit (6.6 percent) and 7 years of in-rank credit (4.2 percent) if the next lieutenant's exam were given in 1981. Many would have the maximum allowable credit for departmental service time (15 years—9 percent), and a significant number (e.g., approximately 33 of the 111 sergeants seeking intervention. Joinder of Individual Sergeants in Motion to Intervene, March 15, 1979.) would have maximum in-rank credit (10 years—6 percent).

[2] A one-time exception is made for officers promoted from the 1976 sergeant's exam roster. They need serve only 18 months as sergeants before being eligible to take a lieutenant's exam.

cludes compromises and concessions made by every party to this litigation. Each no doubt hoped that a full trial on the merits of this case would have produced results or relief more favorable to its interests, but each was willing to forego the chance of achieving complete success in exchange for the less favorable but guaranteed provisions of the consent decree. Similarly, by settling this case out of court, each party avoided the risk that full trial might have yielded results much more adverse to its interests. Each party also avoided the high costs in time, money, and unavoidable divisiveness and bitterness that would have resulted from pursuing the trial to its distant conclusion. These are the very reasons that settlements are favored by courts generally and especially in the Title VII context. *See, e. g., EEOC v. American Telephone & Telegraph Co.*, 419 F.Supp. 1022 (E.D.Pa. 1976), *aff'd*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed.2d 1161 (1978).

The prejudice to their interests that the sergeants perceive must be viewed with these considerations in mind. One of the plaintiffs' essential complaints in this action, based on obvious facts, is the absence of minorities from the upper ranks of the San Francisco Police Department. Delaying the next lieutenant's exam responds to this issue by assuring that significant numbers of minorities are eligible to take the exam when next given. The temporary modification to the system of granting seniority credits on promotional exams assures that these minorities will be able to compete for the promotions on an equal footing with other officers.

Admittedly the sergeants are disadvantaged by these features of the decree. However, the further delay of the next lieutenant's exam would be no greater than the time required for full trial and appeal. Furthermore, the record in this case already includes sufficient evidence to establish findings of discrimination that would support the imposition by this court of quotas or references. Such drastic and intrusive remedies would certainly be more prejudicial to the sergeants' interests than the temporary elimination of promotional exam seniority credits. Moreover, many of the sergeants now protesting this abridgement of seniority rights earned their promotion to sergeant and their subsequently accrued in-rank seniority on the basis of the 1971 Q-50 sergeant's

exam, which has been previously adjudged by this court to violate federal antidiscrimination laws. Memorandum and Order, Sept. 22, 1978. That is, their seniority was earned at the direct expense of the victims of the illegal, discriminatory effects of that exam. Such continuing effects of discrimination would be a further basis for court-imposed affirmative relief. Hence the seniority system modification and the delayed lieutenant's exam scheduling cannot be found to be unfair or unreasonable compromises.

[5,6] It is also very significant that this decree was negotiated by representatives of the San Francisco Police Officers Association (POA), in which the objecting sergeants are members. Its elected Board of Directors recommended the approval of the agreement, and its membership approved the agreement by a 76 percent majority. The POA is a certified collective bargaining agent for the police officers of San Francisco, and it recently negotiated with the Police Department a Memorandum of Understanding that has the force of a collective bargaining contract in California. *Glendale City Employees Association v. City of Glendale*, 115 C.3d 308 (1975). The seniority rights claimed by the sergeants are not constitutionally protected vested property rights as they would suggest, *EEOC v. American Telephone & Telegraph Co.*, 419 F.Supp. 1022, 1037 (E.D.Pa.1976), *aff'd*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed.2d 1161 (1978), and it is clear that a union may in good faith amend seniority provisions in a collective bargaining agreement in carrying out its duties of representation. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). This is precisely what has occurred in this case. In the face of litigation that offered the possibility of much more drastic remedies in this area, in hopes of facilitating the advancement of minorities to the upper ranks of the San Francisco Police Department, the POA exercised its sound discretion and its proper authority to negotiate with the City a temporary change in promotion procedures. Thus the POA's negotiation and approval of this agreement weighs very heavily against the objections of the sergeants, not only because the POA, as the union and the collective bargaining agent of these officers, agreed to it, but also because the POA so competently and vigorously represented these sergeants and defended their promotional rights and oppor-

tunities throughout this litigation. The factual bases for this conclusion are discussed in more detail in our accompanying order denying the sergeants' motion to intervene in this lawsuit. In summary, in strenuously opposing and helping to defeat a proposed settlement last spring because of its adverse impact on its members' interests and in consistently asserting the promotional interests, of its members in proceedings before this court, the POA has convincingly demonstrated its commitment to its sergeants. The fact that the POA accepted this proposed consent decree is a persuasive argument that the decree represents a fair and reasonable end to this litigation for these sergeants and other incumbent police officers.[3]

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[3] The POA's consent to this proposed decree also distinguishes this case from *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), urged by the sergeants as a bar to the relief provided in the decree. Teamsters involved fully litigated court-imposed affirmative relief, in the form of grants of constructive retroactive seniority credits to discriminatees. The defendant union strenuously opposed that remedy and appealed. But since the case at bar involves a consensual settlement with remedies agreed to by all parties, including the POA in its status as the collective bargaining agent and an adequate representative of the sergeants, the Teamsters limitation on court-imposed remedies would appear not to apply.

Furthermore, though we need not and do not decide the question, it appears to us doubtful that Teamsters would necessarily apply to the type of remedies set out in this decree anyway. Although incumbent sergeants here lose seniority credit advantages on promotional exams which they would have enjoyed under the present system, the decree nonetheless gives minorities no actual advantages over incumbents as did the granting of retroactive seniority credit in Teamsters. That is, though seniority rights are prejudiced in that all promotion applicants are equalized, there is no literal preference given to victims of discrimination.

Finally, Teamsters may also be inapplicable for the reason that the present seniority-based promotion system has been challenged by the plaintiffs as having been conceived and implemented with a discriminatory purpose. Hence it would not be a bona fide seniority system immunized under section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e 2(h), as was the system at issue in Teamsters.

Finally, in reply to the claims of the sergeants that the decree discriminates against them on the basis of race, we again note that the decree includes no racial quotas or preferences. Achievement of goals prescribed by the decree is subject to the availability of qualified applicants. The modification of the seniority system impacts equally on all officers, minority and nonminority alike. Indeed, the thrust of this settlement agreement emphasizes equal opportunity in the future, not redress for past wrongs. We cannot agree with these objectors that the decree illegally or inequitably discriminates against them, nor that the balance it strikes among competing interests is anything but fair, just and reasonable.

[7] Also objecting to the proposed decree is Jesse Byrd, a named plaintiff in this action and former president of Officers for Justice. He protests the mitigation requirements of the back pay provisions of the decree as they particularly apply to him as a member of the solo motorcycle detail. He has been receiving a hazard pay differential for this duty, which will be offset against the back pay award for which he may be eligible as a sergeant applicant discriminatee. The assignments for sergeants in the department are such that it is very unlikely that Officer Byrd would have received hazard pay if he had served as a sergeant during the relevant period. Hence he would not have received both the salary increment for being a sergeant and a hazard pay differential during this period. Although Officer Byrd may feel that hazard pay is different in kind from the additional salary he would have earned as a sergeant, this court finds the mitigation provision and its effect on Officer Byrd to be a fair resolution of this issue.

Officer Byrd further contends that the maximum back pay awards allowed by the decree are inadequate, that no compensation to any individual has been included for damages caused by intentional discrimination, and that the promotion, recruitment, and training relief provided in the decree are too limited. In response we again emphasize the costs and risks of litigation and the desirability of settlement to achieve a resolution that all parties can accept. It is possible that after a fully litigated finding of liability, this court might have imposed remedies of the kind suggested, but the delay alone before said measures might be

effected would dilute them considerably. In any case, though we are appreciative of Officer Byrd's position and his sentiments as an alleged victim of discrimination and one of the initiators of this lawsuit, we are of the opinion that this decree offers meaningful and adequate remedies for the effects of past discrimination, effective procedures for the prevention of future discrimination, and a legal and equitable disposition of this dispute.

[8,9] The final objection submitted to this court concerns the possibility that the departmental age requirements may bar successful reapplication by some individuals discriminated against by past entry exams. Although such discriminatees might be eligible for back pay awards under the decree, no specific relief in the form of employment is ordered. They may of course reapply, but admittedly the age requirements in the City Charter may now disqualify some. We note the adverse impact on this objector and others similarly situated, but this objector has not challenged the legality of these requirements, and such a determination is beyond the scope of the instant action. We find that the back pay awards and recruitment goals and future entry opportunities for minorities provided by the decree are most adequate.

Having considered the objections to the proposed consent decree, the interests of those affected by it, the record of this case, and relevant legal and equitable principles, we conclude that this decree is deserving of our approval. It presents a just, fair and reasonable resolution of this action that offers adequate relief to the victims of past discrimination without unduly burdening innocent third parties, but most importantly, it assures the future integration of the San Francisco Police Department by providing equal and meaningful opportunities for the entry and advancement of minorities and women.

IT IS SO ORDERED.

APPENDIX

CONSENT DECREE

The plaintiffs Officers for Justice, et al., filed their Complaint in this action on April 23, 1973 (amended on June 30, 1977),

against the Civil Service Commission of the City and County of San Francisco, alleging that the defendants are engaged in a pattern or practice of discrimination in employment on the basis of race, sex and national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq., as amended by the Equal Employment Opportunity Act of 1972 (Pub.L. 92-261, March 24, 1972); 42 U.S.C. Section 1981 and 42 U.S.C. Section 1983. The plaintiffs have, during the course of this litigation, introduced substantial evidence of intentional discrimination by the defendants. This Court has issued preliminary orders finding the defendants' selection practices and procedures for entry-level and Sergeant positions to be discriminatory and in violation of federal law. These decisions are to be found at 371 F.Supp. 1328 (N.D.Cal.1973), 395 F.Supp. 378 (N.D.Cal.1975), 14 EPD 7548 (N.D.Cal.1977), and 14 EPD 7549 (N.D.Cal.1977), and, further the Court on September 22, 1978 granted plaintiff United States partial Summary Judgment with respect to certain of defendants' examination procedures.

No findings of any kind have been issued by the Court concerning the validity of the 1974 audio-visual entry-level selection device. Defendants, by entering into this Consent Decree, do not admit thereby that said examination in any way violates federal law, rule or regulation.

Prior to a final hearing on the merits of this litigation, the plaintiff United States of America filed its Complaint against the City and County of San Francisco, alleging that the defendants are engaged in a pattern or practice of discrimination in employment on the basis of race, sex and national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq., as amended by the Equal Employment Opportunity Act of 1972 (Pub.L. 92-261, March 24, 1972), the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. Section 3701, as amended, and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. Sections 1221, et seq. The two cases have been consolidated.

The parties wish to avoid the delay and expense of contested litigation and desire to insure that any disadvantage to minorities and females that may have resulted from past hiring and promo-

tional practices be remedied so that equal employment opportunity will be provided to all.

The Court has jurisdiction over the parties and subject matter of this action.

The parties, by agreeing to the issuance of this order, waive a hearing and findings of fact and conclusions of law on all issues raised by the complaints, and the parties have mutually agreed to the entry of this Consent Decree. Defendants, by entering into this Consent Decree, do not thereby admit any violations of law, rule or regulation with respect to the allegations made by plaintiffs, private or governmental, in their complaints. By entering into this Consent Decree, defendants do not concede the legal and constitutional validity of the Court's findings of discrimination. Defendants admit to no failure to practice affirmative action.

The Court having been fully advised and informed of the facts and circumstances, and good cause appearing therefor,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

I

EFFECT OF THE CONSENT DECREE

This Decree is entered into as a settlement of an existing dispute between plaintiffs, both private and governmental, and defendants as to appropriate and valid procedures for the hiring and promotion of police officers for the City and County of San Francisco. It also provides for specific, definable and good faith efforts to be made by defendants to achieve certain goals for employment of women and minorities as herein defined, within specified periods of time. This Consent Decree satisfies and resolves all claims of the private plaintiffs and the class they represent, and of plaintiff United States, of racial, ethnic, national origin and sex discrimination with respect to those matters set forth in the complaints and the previous orders of this Court.

This Decree also enjoins the Law Enforcement Assistance Administration from suspending financial assistance to the San Francisco Police Department pursuant to 42 U.S.C. Sec-

tion 3766(c)(2)(E) and the Complaint filed by the United States of America on December 22, 1977.

Both private plaintiffs and the class they represent, and plaintiff United States, shall seek no further relief for the acts, practices or omissions alleged in the complaints save to enforce the provisions of this Decree, thereby waiving the right to seek further relief.

Plaintiffs, both private and governmental, agree that this Consent Decree is fully binding individually and on the class they represent. Defendants agree that this Consent Decree is fully binding on each of them, each of their officers, agents, employees and successors, and all other persons acting in concert with them who have notice of this Decree.

II

DEFINITIONS

For the purposes of this Consent Decree, the following terms shall be defined as follows:

"Plaintiffs"—The named parties plaintiff of both Officers for Justice, et al. v. Civil Service Commission, et al., No. C-73-0657 RFP and the class they represent, and United States of America v. The City and County of San Francisco, No. C-77-2884 RFP.

"Defendants" or "City"—The named parties defendant in both of the above-referenced actions, except for intervenor Police Officers Association.

"Minorities"—For purposes of this Decree, the term "minority" shall include only those persons within the groups "Black", "Hispanic" and "Asian or Pacific Area people" as defined at 28 C.F.R. 42.402(e).

"Private Organizational Plaintiffs"—The named organizational Plaintiffs of Officers for Justice, et al, v. Civil Service Commission, et al., specifically the Officers for Justice, the National Organization for Women, Chinese for Affirmative Action, the League of United Latin American Citizens, and

the National Association for the Advancement of Colored People.

"Parties"—The"plaintiffs" and "defendants" as defined above, and defendant-intervenor Police Officers Association.

III

CLASS CERTIFICATION

Plaintiffs brought this action as a class action seeking to represent various categories of persons for purposes of securing injunctive and declaratory relief, as well as for the recovery of back pay, compensatory and punitive damages. In its order of May 12, 1977, the Court certified the plaintiff class for purposes of injunctive and declaratory relief. For purposes of this Decree, the Court hereby adopts the class description set forth in that order with modifications as follows:

There shall be two plaintiff subclasses. Subclass (a) shall consist of all Blacks, Hispanics, and Asians (including Chinese, Filipinos, Japanese, Korean and other Pacific Area people), who:

(a) completed the entry level Q-2 or Q-20 examination administered by defendants during the years 1969—72, but failed or placed so low that there was no likelihood of their permanent appointment, or who were disqualified because of height;

(b) applied for the 1974 Q-2 examination, but were discouraged or dissuaded from completing the examination process as a result of alleged discriminatory practices of defendants;

(c) completed the 1974 Q-2 examination, but failed or placed so low that there is no likelihood of their permanent appointment;

(d) have been discriminated against in any temporary or permanent promotions or other benefits by their lack of seniority in the police department which is the cumulative effect of discrimination at the entry level;

(e) completed the 1971 Q-50, or 1972 Q-35 promotional examinations, but failed or placed so low that they did not receive, appointment;

(f) failed the 1976 Q-35 or Q-50 promotional examinations, or would not have received appointment but for the provisions of this Decree in paragraph 10(a);

Subclass (b) shall be all women who:

(a) took the last Q-20 examination and did not receive appointment from the eligible list;

(b) applied for the 1974 Q-2 examination, but were discouraged or dissuaded from completing the examination process as a result of discriminatory practices of defendants;

(c) completed the 1974 Q-2 written examination, but did not complete the process or were disqualified on the basis of the physical agility examination;

(d) were appointed to the position of Q-2 patrol officer as a result of this Court's order of May 5, 1975, 395 F.Supp. 378;

(e) were Q-20 policewomen who were precluded, because of their sex, from eligibility for the Q-50 examination process until 1976.

This action was brought, insofar as is relevant to this section of the Decree, on the basis of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e et seq., as amended, and 42 U.S.C. Sections 1981, 1983. For purposes of this settlement alone, and for no other purposes, the Court is satisfied that the above class should be and hereby is certified as proper under Federal Rule of Civil Procedure 23(b)(2) for injunctive, declaratory and back pay relief, and under Federal Rule of Civil Procedure 23(b)(3) for purposes of recovery of compensatory or punitive damages, if any.

IV

GENERAL

1. Defendants are compelled by law and by entering into this Consent Decree acknowledge their obligation to, and agree that they shall, refrain from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or potential applicant for employment with, the San Francisco Police Department because of such individual's race, sex or national origin. Defendants in addition acknowledge their duty under law to, and agree that they shall, refrain from discriminating at any time on the basis of race, sex or national origin in hiring, promotion, upgrading, training, assignment or discharge or otherwise discriminating against an individual employee or applicant for employment with respect compensation, terms and conditions or privileges of employment because of such individual's race, sex or national origin. The City shall take reasonable steps to assure that no member of the police department interferes with the enforcement of this Decree by any means, including the harassment or intimidation of minority or female officers protected by the terms of this Decree. The acknowledgments set forth in this paragraph do not create a right or rights in any person or group of persons to seek relief under this Decree for defendants' failure to comply with their general legal obligations as described in this paragraph, except for conduct which constitutes a pattern or practice of unlawful discrimination on the basis of race, sex or national origin.

2. In the event the entry of this Consent Decree generates, either through intervention or separate, collateral lawsuits, attacks on the appropriateness or sufficiency of any of the provisions contained herein, to include actions claiming entitlement to damages against the City as a result of the ordering of any of the affirmative relief contained in this Decree, the parties hereto agree and want that they shall defend the lawfulness of any provision or provisions so attacked. If any such collateral lawsuit arises in state court against the City, it shall seek to remove such action to the Federal District Court.

V

RECRUITMENT

3. The City shall continue to develop and reassess its present affirmative recruitment program designed to inform minorities and women of job opportunities with the San Francisco Police Department. The City is obligated to engage in such recruitment practices as may be reasonably necessary to attract sufficient qualified minorities and women to meet the goals set forth in paragraph 9a below. Specific recruitment programs shall be designed with the participation and support of the parties, as specified in paragraph 11 below. The recruitment program shall include contacts with area high schools, technical and vocational schools, colleges, and organizations which have traditionally expressed an interest in providing minority and female applicants or which indicate such interest in the future, and informing them of employment opportunities for City residents. In addition, where appropriate, advertising of employment opportunities shall be placed in radio stations and other mass media primarily directed to Black, Hispanic, Asian and female audiences for the purpose of emphasizing to minorities and women the availability of employment positions.

VI

SELECTION PROCEDURES

4. The City shall, except as provided herein, make no further use of tests or other selection qualifications, standards or procedures for hiring or promotion within the San Francisco Police Department the use of which has been enjoined by previous orders of this Court, or any tests, qualifications, standards or other procedures within said Department which have a disproportionately adverse impact against minorities or females, unless and until such standards have been shown to be valid, pursuant to the Uniform Guidelines on Employee Selection Procedures, 43 Fed.Reg. 38290, August 25, 1978, or any superceding federal guidelines. All evidence of validity of proposed tests, standards or selection procedures to be used subsequent to the entry of this Decree shall be submitted to the parties' counsel for review and

comment at least sixty days prior to their implementation. In order to meet the hiring goals for females set forth in paragraph 9 below, the City will establish physical agility scores utilizing the same T-score for women vis-a-vis women as the T-score for men vis-a-vis men. The City shall establish eligibility lists on the basis of examinations, and make selections from those lists, in a manner consistent with its obligation to expedite and facilitate the achievement of all goals set forth in this Decree.

5. The City shall require that all applicants for police officer be bona fide residents of the City and County of San Francisco at the time of their application and appointment, with residence thereafter to be maintained as required by City and State law.

6. The following written notice shall be given to all persons who take an examination for hiring or promotion within the department for the duration of this Decree: This examination and the selection procedures to follow are the subject matter of a Consent Decree on behalf of minorities and women entered in the United States District Court for the Northern District of California and are matters which are subject to the scrutiny of that Court. The Consent Decree is on file and available for review at the Clerk's office of the Federal District Court, 450 Golden Gate Avenue, as Civil Actions No. C-73-657 RFP and No. 77-2884 RFP.

VII

ASSIGNMENT AND DISCIPLINE

7. The City is compelled by law, and by entering into this Consent Decree acknowledges its obligation to, and agrees that it shall, refrain from discriminating at any time on the basis of race, sex or national origin in assignments or discipline within the San Francisco Police Department. Disciplinary reporting shall be made as provided in paragraph 14g below and records of all assignments shall be made available to the auditor upon request, as herein provided. The acknowledgments set forth in this paragraph do not create a right or rights in any person or group of persons to seek relief under this Decree for defendants' failure to comply with their general legal obligations as described in this

paragraph, except for conduct which constitutes a pattern or practice of unlawful discrimination on the basis of race, sex or national origin.

VIII

GOALS

8. In order to eradicate the present effects of past hiring and promotion practices with respect to minorities and women, the City shall adopt and seek to achieve as a long-term goal the recruitment, appointment and promotion of qualified minorities and women in sufficient numbers so as to increase substantially the minority and female composition of the San Francisco Police Department, so that it more nearly reflects the racial, ethnic and sexual composition of the relevant labor force of the City and County of San Francisco. For the purposes of this Decree, the long-term goal of defendants shall be to raise the minority representation to 45 percent of the sworn personnel of the San Francisco Police Department.

No specific numerical long term goal is set with respect to the representation of women on the sworn force, it being understood by the parties that equality with the qualified female labor force percentage may not be reached within the term of this Decree. The parties further understand that the interim goals for women established in paragraph 9 herein, while the only enforceable goals in this Decree for women, are minimum goals and it is expected that active and effective recruitment and training efforts by defendants may result in the appointment of significantly higher proportions of qualified female applicants. On attainment of the long term minority goal prior to expiration of this Decree and upon motion of defendants, the Court shall grant the City relief from compliance with the interim minority hiring procedures established in paragraph 9 hereof. All efforts, goals and objectives referred to herein require good faith effort on the part of the city.

9. Hiring.

The hiring objectives set forth herein are goals not quotas, and as such are subject to the availability of qualified applicants. Nothing herein shall be interpreted to require the hiring or promotion of unqualified persons, it being understood that the use of a selection procedure or examination shall not justify failure to meet a goal set out herein unless the procedure or examination is shown to be valid under the Uniform Guidelines on Employee Selection Procedures, supra.

a. To insure as quickly as practicable the attainment of its long-term goal, the City shall, subject to the availability of qualified minority and female applicants, adopt and seek to achieve the following interim objective:

In filling future vacancies at the entry level of the San Francisco Police Department, the City shall adopt and seek to achieve the goal of appointing sufficient minorities and women each year so that at least 50 percent of vacancies are filled by minorities and 20 percent of vacancies are filled by women, until the long-range goal of this Decree has been achieved, or until the expiration of this Decree, whichever occurs first. Minority women shall be considered to satisfy both the minority and female goals above. For purposes of eligibility list E-91 only, the goal for females shall be 20 percent of available vacancies plus 30 women over the life of said list, with the goal to revert to 20 percent for all lists thereafter during the pendency of this Decree.

b. Because there may be persons within the City and County of San Francisco who are disadvantaged by an English language disability, especially in the Chinese community, the City agrees to adopt and seek to achieve as a long-term objective the appointment of persons bilingual in Chinese to the department so that the proportion of officers bilingual in Chinese in the San Francisco Police Department more nearly reflects the proportion of non-English speaking Chinese persons in the City's total population. In addition, the agreement entered into between the San Francisco Police Department and the Law Enforcement Assistance Administration on December 28, 1977, to resolve a preliminary finding of noncompliance with the Safe Streets Act issued by

LEAA on November 16, 1977, is attached hereto as Exhibit A and incorporated herein by reference. The City shall undertake a special recruitment and hiring program, the objective of which will be specifically to secure bilingual Chinese-speaking officers for appointment to the department.

Pursuant to this requirement, the City shall adopt and seek to achieve a goal of appointing from the next Q-2 eligible list adopted after May, 1979, nine officers bilingual in Chinese, subject to their availability on said eligible list. In the event any of the nine persons so appointed are minorities, they shall not be counted to satisfy the goals to which the City agrees in paragraph 9(a) above. In addition, the City shall adopt and seek to achieve a goal of appointing twenty officers bilingual in Chinese, subject to the availability of such persons, by January 1, 1984, from available Q-2 eligible lists. The City agrees at all times during the period of this Decree to be responsive to the need for bilingual police officers beyond that set forth in this Consent Decree and bi-annually assess the delivery of police services to the minority, language-disadvantaged communities of San Francisco.

c. Only those persons who successfully complete the academy and field training programs shall be counted for purposes of determining compliance with the goals set forth in paragraph 9a above. For the purposes of this Decree, the academy and field training program shall be deemed to be eight months in duration.

10. Promotion. To insure as quickly as practicable the attainment of its long-range promotional goals, the City agrees to the following:

a. Sergeant and Assistant Inspector

(1) The City agrees that it shall by August 1, 1981, increase the number of sworn officers in the San Francisco Police Department to the full budgeted strength of 1,971 persons, and shall maintain at least that level of staffing until at least August 1, 1984.

(2) The department will by January 1, 1981, offer promotion to the ranks of Sergeant or Assistant Inspector to all officers in rank order on the respective 1976 informational

rosters of candidates eligible for promotion to those positions. Those persons holding temporary appointments to those ranks as of December 1, 1978, shall be retained in said status until their permanent appointment. Seniority shall accrue in rank order to persons appointed pursuant to this provision as of the date of permanent appointment.

(3) After appointments to Sergeant or Assistant Inspector in accordance with subparagraph 10a(2) above, the City shall, subject to the availability of qualified minority and female applicants, adopt and seek to achieve an annual goal of selecting minorities and women for promotion to permanent Sergeant and Assistant Inspector positions in proportion to their representation in the qualified applicant pool for each examination.

(4) In view of the fact that the rate of appointments in the past ten years for the rank of Sergeant has been twenty-five persons annually and fifteen persons annually for the rank of Assistant Inspector, the City shall maintain at least this rate of appointment in said ranks from and after August 1, 1981, through the termination date of this decree.

b. Lieutenant and Captain:

(1) The City will administer the next Lieutenant examination when all the minorities and women promoted to Sergeant in accordance with paragraph 10a(2) above are eligible to compete for promotion to Lieutenant

(2) Subject to the availability of qualified minority and female candidates, the City shall adopt and seek to achieve the annual goal of selecting minorities and women for promotion to Lieutenant and Captain in proportion to their representation in the qualified applicant pool for each examination.

(3) The City shall limit to two years the life of the eligibility lists for the next two Captain examinations administered following entry of this Decree.

(4) The City shall conduct an extensive review of the selection procedures for the positions of Lieutenant and

Captain to ensure their job relatedness and to attempt to minimize or eliminate adverse impact on minorities and women.

(5) At least 120 days in advance of the administration of each examination for Lieutenant and Captain, the City shall notify counsel for the parties of the nature and scope of the anticipated examination, the procedure by which it was developed, and expected means of scoring and ranking applicants. Thereafter, the City shall notify counsel for the parties of the results, by race, sex and national origin, for each stage of the examination process within ten days of its administration if practicable and at least 60 days before any eligibility list is formally adopted. If any of the parties wish to object to the examination process or any portion thereof, they shall notify the other parties in writing within 30 days of the receipt of the information set forth above of the nature of the objections and the parties shall meet promptly to attempt to resolve the objection. Failing resolution in this manner, any party may move the Court for resolution.

(6) In view of the fact that the rate of appointments in the past ten years for the ranks of Lieutenant and Captain have averaged on an annual basis no less than twelve persons and four persons respectively, the City shall appoint between August 1, 1985 and the termination date of this decree in the aggregate forty-eight persons to the rank of Lieutenant and sixteen persons to the rank of Captain. This commitment shall be measured over this four-year period and not on an annual or other basis.

c. Nonpermanent Appointments. In the absence of civil service eligible lists, future nonpermanent appointments from the next lower rank in the uniformed force shall be based on experience (which may include seniority), demonstrated performance, and potential to fulfill the requirements of the position to which the appointee will be assigned but shall be made without regard to seniority as a sole criterion and, consistent with the foregoing, reasonable efforts shall be made to give leadership experience to minorities and women.

d. In order for the City to construct promotional examinations that appropriately sample the knowledges, skills and abilities essential to the particular promotive rank or position, said examinations need not be entirely of a written character, nor shall test content be necessarily related to material taken from a bibliography promulgated within the police department at least six months prior to the administration of the examination, and the examination components shall be weighted as is appropriate to the rank or position for which the examination is held. Said examinations shall consist of a combination of written and oral components, and shall be job-related,

No service credits on promotional examinations or other service requirements as a prerequisite to competing in said examinations during the pendency of this Decree shall be granted or imposed, except as follows:

(1) Any sworn member of the police department who has served in the department not less than three years shall be eligible to participate in a competitive examination for either the rank of Sergeant or Assistant Inspector.

(2) a. Any sworn member of the police department who has held a permanent appointment in the rank of Sergeant for not less than two years shall be eligible to participate in a competitive examination for the rank of Lieutenant.

b. On a one-time only basis, those persons promoted to Sergeant pursuant to paragraph 10a(2) above shall be eligible to participate in a competitive examination for the rank of Lieutenant after holding a permanent appointment in the rank of Sergeant for not less than eighteen months. This exception does not and will not apply to any other persons nor to any other examinations for Lieutenant save for that referred to in paragraph 10b(1) above.

(3) Any sworn member of the police, department who has held a permanent appointment in the rank of Lieutenant for not less than two years shall be eligible to participate in a competitive examination for the rank of Captain.

(4) Five years after the entry of this Consent Decree, the City may adopt a policy of giving service credits to applicants for promotion, worth up to a maximum of five percent of a candidate's standing in the competitive process, by allowing one and two-thirds percent credit in the process as a whole for each year that a candidate has held a permanent appointment in the rank from which promotion is to be made up to a maximum of three years per candidate.

The Chief of Police shall have power, subject to the approval of the Police Commission, to appoint any sworn member holding a permanent appointment in the rank of Lieutenant or above to any non-civil service rank as created by the Police Commission pursuant to the provision of Charter Section 3.530.

IX

SPECIFIC RELIEF

11. Recruitment, Training and Promotion of Minorities and Women.

a. In order to achieve the goals set forth herein, the City shall develop a full scale program specifically designed to recruit and train minorities and women for hiring, and prepare them for promotion, in the Police Department. This program shall be consistent with the recruitment program approved and ordered by the Court on November 21, 1978. The program shall contain both a specific and comprehensive two year plan and at least a specific outline of a long-range plan. The program shall include steps designed to ensure that the parties are fully involved at all levels of planning. The program shall also designate specific roles for active participation by the parties. Each program will include participation of qualified persons, including the parties wherever possible and appropriate. In devising this program, the City shall take into account the important role that minorities and women, and minority and women's organizations, must play in implementing the program and ensuring that the goals set forth in this Decree are fully met.

b. The Defendants shall adopt a program for the development of Chinese bilingual skills. It shall be administered by entities independent of the Police or Civil Service Commissions, subject to approval of the Auditor-Monitor, and the parties and shall be subject to appropriate audits. Available funds shall be used to train officers, without regard to race, in at least some language skills in Chinese, and to upgrade the skills of those who already speak some Chinese.

12. Auditor-Monitor: The Defendants shall assume reasonable costs, including salary, fringe benefits, para-professional and secretary services, office space, duplicating, travel, postage and other related costs, for an Auditor-Monitor, regarding compliance with this Decree. The Auditor-Monitor, hereinafter Auditor, shall be employed as is necessary to discharge fully and expeditiously the duties set forth herein until termination of this Decree. The Auditor's duties shall include but not be limited to:

a. Preparing the reports to the Court and the parties required by paragraph 14 below;

b. Administering the $500,000.00 Fund, described in paragraph 13 below, in order to ensure that recruitment, training, testing and promotions are proceeding in an appropriate fashion consistent with the goals and objectives of this Decree;

c. Assuring that assignments and disciplinary proceedings are free of discrimination on the basis of race, sex or national origin;

d. Making a determination of the race or national origin of candidates for appointment in accordance with the definitions adopted in Part II of this Decree, subject to objection by the parties hereto;

e. Verifying that all data submitted by the City to the parties and the Court pursuant to this Decree are complete and accurate. Pursuant thereto, the Auditor shall have full and complete access to all data available to the City regarding the above matter and shall have the right to make appropriate requests for the gathering and compilation of

additional data necessary to accomplish the goals and objectives of this Decree. The Auditor shall also have full and complete access to all personnel who could be helpful in effectuating the goals, and objectives set forth herein; and,

f. Any and all documents, records or other material submitted to the Auditor as provided herein subject to a claim of privilege under state or federal law shall be deemed confidential and treated as such by the Auditor and shall not be subject to public disclosure absent an order of the Court.

The Auditor, after consultation with the parties and subject to approval of the parties to this Decree, shall review and approve the City's plans to achieve the goals and objectives set forth in this Decree. With continuing appropriate consultation with said parties, the Auditor shall determine those recruitment, testing, professional upgrading, leadership and promotional programs to be implemented from the Fund, and give financial approval to those programs. Such programs shall be solicited from the City and the other parties and other qualified organizations. Any unresolved disputes between the Auditor and said parties shall be submitted, upon appropriate notice, to the Court for resolution. The Auditor shall submit quarterly reports to the Court and said parties regarding the nature and amount of funds disbursed from the $500,000.00 Fund.

The experience and professional stature of the Auditor shall be commensurate with these duties, as shall be his or her salary. The Auditor shall be selected by the Court from among persons jointly recommended by the parties to this Decree or by the Court itself subject to approval of the parties to this Decree.

13. Monetary Relief:

The parties to this Decree have agreed that the aggregate monetary relief in this case shall be $900,000, $400,000 of which shall go for back pay and other damages as set forth in paragraph 13(b) below. The remainder of this sum ($500,000) shall be deposited with the Treasurer of the City and County of San Francisco within 45 days of final approval of the Consent Decree in a special interest bearing account with interest accruing to the Fund, said sum to be used to fund the goals and objectives of this

Decree. Primary use of this fund shall be for recruitment, testing, training, and professional upgrading and leadership opportunities for minorities and women. The purpose of this fund shall be to initiate programs as part of the City's obligation in this Decree, it being understood that the City has the continuing obligation to provide monies reasonably necessary to meet its responsibilities herein. Upon receipt of a voucher from the Auditor, the Controller of the City and County of San Francisco shall disperse from this Fund sums in accordance with the procedures set forth in paragraph 12. All disbursements shall be in accordance with generally accepted accounting principles, subject to audit, and shall be described in the quarterly reports to be submitted to the parties and the Court.

a. Master. Defendants shall assume reasonable costs, including salaries, fringe benefits, para-professional and secretarial services, office space, duplicating, travel, postage and other related costs for a master regarding distribution of the monetary relief under this Consent Decree. The master shall be selected with the approval of the Court from names jointly recommended by the parties to this Decree, or shall be selected independently by the Court. The master shall be employed as is necessary to discharge fully and expeditiously the duties set forth herein. The master shall review and approve a plan for the distribution of monetary relief to the class which shall be submitted by the parties to this Decree, subject to final approval of the Court. The master shall also review and approve each individual claim for back pay, based upon an appropriate showing that the individual qualifies for receipt of monetary compensation under the proposed categories submitted by the parties to this Decree (Exhibit B), and shall distribute all payments to claimants. The master shall be provided any and all information necessary to review and approve the proposals submitted by the parties hereto, as well as to review and approve the individual claims submitted by class members.

b. Monetary relief. Subject to the provisions of paragraph 13(c) below, monetary relief under this Decree shall be distributed within the limits set forth below:

Back Pay for Class Members: The master shall be authorized to award to individual class members subject to proof in accor-

dance with the standards set forth in the attached Exhibit B hereto up to $3,720 for back pay relief, which shall satisfy the entire claim of each individual class member against the Defendants, for back pay and any other damages under Title VII and 42 U.S.C. Sections 1981, 1983, and shall make claimant whole. There shall be a fund available for such distribution in the sum of $400,000, subject to the conditions in paragraph 23 below,

c. Plan for Distribution, Subject to the monetary limits set forth in paragraph 13(b) above, distribution of monetary relief shall be made by the master in accordance with qualification categories and monetary limitations set forth in Exhibit B hereto. With respect to Exhibit B categories 1(b) and 2(b), no person who qualifies for a payment in those subclasses shall in any event receive more than the maximum individual amount provided or a claimant's pro rata share of the fixed total amount shown on Exhibit B as allocated to that subclass, whichever is greater. With respect to the remaining subclasses, the total amount of money allocated for payment to each subclass shall be determined by the master upon joint recommendation of the parties to this Decree after the number of claimants has been established so that the allocations among these subclasses results in the maximum proportionate recovery (subject to the established maximum individual limits) to the maximum number of claimants.

When the master is satisfied that after reasonable notice all possible outstanding claims have been made, any remaining funds which have not been distributed to any of the above designated parties shall revert to the fund described more fully in paragraph 13.

d. All persons making claim for monetary relief herein shall execute a release in the form attached as Exhibit C as a condition of payment.

REPORTING

14. Within thirty days of the entry of this Decree, and within thirty days of the last day of each calendar quarter for the duration of this Decree, the City shall submit to counsel for the

parties a report or computer printout containing the following information:

a. A summary by race, national origin and sex of the number of persons in each rank at the end of the reporting period, including the number of such persons hired and/or promoted to such rank and leaving such rank during the reporting period voluntarily or involuntarily, The report filed thirty days after entry of the Decree need include only such a summary of persons in each rank as of the date of the Decree.

b. A list identifying all sworn members of the Police Department by name, rank and unit of the department, and (except for the first report) identifying all such persons who were either appointed or promoted during the quarterly reporting period together with their appointment or promotion date, and identifying those who during the quarterly reporting period voluntarily or involuntarily left the employment of the department and the reasons therefor.

c. A list of the persons certified for appointment, appointed, or promoted to each sworn position in the department in accordance with paragraphs 9 and 10 above, including each person's position on any eligibility list. With respect to applicants and new hires, the City shall make available to counsel for the United States upon request. each person's home address and telephone number. Counsel for the United States agrees to keep such information confidential in accordance with the protective order previously entered in this litigation.

d. A list of individuals who failed to complete academy training, during the preceding quarter, including the reasons for the termination, voluntary or involuntary, of each such candidate.

e. A list of patrol officers who complete the probationary period, and for each probationary patrol officer who is dismissed or no longer a probationary officer, the reasons therefor.

f. A list of persons who applied for each sworn position in the department, identifying the person actually tested, the persons who passed each component of the examination and the scores reported for each component, and the persons who passed each complete examination.

Each list described in subparagraphs b through f above shall identify each individual by name, rank, social security number, race, sex, and national origin. The City shall also submit a copy of any computer tapes used to prepare the reports required by this paragraph 14, if requested by plaintiff United States.

g. A list of individuals against whom any disciplinary action was initiated by formal charge of the Chief of Police, the basis for such action, the persons actually disciplined, the disposition of each disciplinary action, and if sustained, the extent of the penalty or punishment.

15. The City shall provide counsel for the parties a copy of each eligibility list for hiring or promotion to any rank in the department at least thirty days in advance of the list's official posting or publication. Each list so provided shall be identified by race, sex, and national origin.

XI

RECORD KEEPING

16. The City shall retain all records until further order of this Court relating to the recruitment, selection, appointment, promotion, training, assignment and discipline of persons for sworn officer positions in the Police Department, including:

a. all applications identified by race, sex and national origin;

b. all examinations administered including dates thereof and the scores of each applicant, identified by race, sex and national origin, on each component of the exam;

c. eligibility lists and appointments, identified by race, sex and national origin;

d. training and other employee evaluations.

Counsel for the parties shall have the right to inspect and/or copy for their use in connection with enforcement of this Decree any or all of the records described above, upon reasonable notice to the City subject to appropriate protective order. Counsel for the parties may request inspection or copying of other records for good cause shown upon application to the Court.

XII

MISCELLANEOUS

17. Attorneys' Fees. The City shall pay counsel for plaintiffs OFJ, et al., attorneys' fees in an amount no less than $238,700 and no more than $385,000 in settlement of all claims by said counsel for attorneys' fees from the commencement of this action through the expiration of this Decree, subject to the conditions in paragraph 23 below. The precise amount of the attorneys' fees to be paid shall be determined by the United States Magistrate after a hearing on the question. This amount shall be credited for any interim attorneys' fees ordered by the Court and paid by the City, with any interim fees to be paid within ninety days of the final approval of this Decree. These attorneys' fees shall also compensate counsel for plaintiffs OFJ, et al., for all work to be performed during the pendency of this Decree so long as the Court finds that the conduct of the City is in good faith.

18. If any provision of this Decree causes a result unintended by all the parties or an ambiguous interpretation, the aggrieved party shall notify the other parties by mail of the unintended result or ambiguous interpretation. The parties shall have 30 days after the date of such letter to resolve the problem. If the parties are unable to reach agreement within such 30 days, the issue may be submitted to the Court for resolution.

19. In the event any provision of this Decree is held unlawful by a court, all other provisions of this Decree shall remain in effect and only the rights and/or obligations established in the voided provision shall be extinguished.

20. This Decree shall continue in full force and effect for a period of ten years from and after the date of final approval hereof by the Court. The Decree shall terminate upon filing of an order of dismissal with prejudice by defendants at any time after the expiration of this ten year period, unless plaintiffs show good cause upon motion served and filed prior to termination why the Court's jurisdiction should be continued. During the effective period of this Decree, the Court shall have continuing jurisdiction for the purpose of effectuating the purposes and terms of said Decree and providing for the enforcement thereof.

21. The only obligations of this Decree are those explicitly stated herein.

22. Good faith efforts to comply with the provisions of this Decree are the standards of compliance for this Decree except where the law provides a higher standard.

23. In the event that upon final approval and entry of this Decree appeal is taken therefrom, the monies described in paragraphs 13(b) and 17 (except interim fees awarded and paid) shall be deposited by defendants in an interest bearing special account with the Treasurer of the City and County of San Francisco, to be paid, together with accrued interest, only in the event of final resolution of the appeal upholding the provisions of this Decree supporting or justifying an award of attorneys' fees and/or monetary relief.

XIII

NOTICE

Notice of this Decree shall be provided to members of the class of plaintiffs in accordance with the Court's order of March 30, 1979.

Consent to the entry of the foregoing Decree is hereby, made.

ROBERT L. GNAIZDA
LOIS SALISBURY
Public Advocates, Inc.

By /s/ ROBERT L. GNAIZDA
Robert L. Gnaizda

By /s/ LOIS SALISBURY
Lois Salisbury

OLIVER JONES
NAACP—Western Region

By /s/ OLIVER JONES
Oliver Jones
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By /s/ STEPHEN WARREN SOLOMON
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By /s/ GEORGE AGNOST
George Agnost, City Attorney

By /s/ MICHAEL C. KILLELEA
Michael C. Killelea,
Deputy City Attorney

By /s/ PHILIP S. WARD
Philip S. Ward,
Deputy City Attorney

By /s/ JEROME A. DEFILIPPO
Jerome A. Defilippo,
Deputy City Attorney

By /s/ KENNETH J. HARRINGTON
Kenneth J. Harrington,
Deputy City Attorney
Attorneys for Defendants

This Consent Decree is finally approved and its entry is ORDERED.

Supreme Court, U.S.
FILED
5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1984

In The

Supreme Court of the United States

October Term, 1988

SAN FRANCISCO POLICE OFFICERS' ASSOCIATION, LYNNE A. TORRES, LILLIAN CHAI MATTOCH, and HENRY KIRK,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; CIVIL SERVICE COMMISSION; LOUIS HOP LEE, REVEREND DR. HOWARD S. GLOYD, CARLOTA TEXIDOR DEL PORTILLO, GENEVIEVE W. POWELL, and A. LEE MUNSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LOUISE H. RENNE
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QUESTIONS PRESENTED

(1) Are the persons who would have been promoted had a municipal employer persisted in using the results of a promotional examination which generated adverse impact and had not been validated victims of employment discrimination entitled to a remedy under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, *et seq.*)?

(2) May the courts award promotional and/or monetary remedies to persons who have not themselves filed suit and are not members of a certified class for alleged violations of their rights by a municipal employer which utilizes a race-conscious selection procedure to compensate for the results of an invalid promotional examination given pursuant to a Title VII consent decree?

(3) May a municipal employer be required under Title VII to attempt to validate a promotional examination given pursuant to a consent decree when the results of that examination demonstrate adverse impact against minorities and women, expert evidence indicates that the employer failed to consider alternatives which would not generate adverse impact, and when there is available to that employer an alternative selection procedure which does not generate adverse impact and which is concededly as valid a selection mechanism as the original procedure?

PARTIES

The parties to the proceedings below were as follows: Petitioners San Francisco Police Officers' Association, Lynne A. Torres, Lillian Chai Mattoch, and Henry Kirk were the plaintiffs in the district court and appellants in the Court of Appeals. Respondents City and County of San Francisco and its Civil Service Commissioners Louis Hop Lee, Reverend Dr. Howard S. Gloyd, Carlota Texidor Del Portillo, Genevieve W. Powell, and A. Lee Munson were defendants in the district court and appellees in the Court of Appeals.

The Association is a labor organization representing police officers, sergeants, and inspectors in their employer-employee relations with the City. Torres, Mattoch, and Kirk took the promotional examinations described herein and claim they were adversely affected by the post-test reweighting of examination components, weights, and cutoffs described herein.

Officers for Justice, an organization of minority and female police officers and applicants, and a signatory to the consent decree underlying this action, participated as intervenors on behalf of respondents in the proceedings below. The Department of Justice of the United States of America participated as *amicus curiae* on behalf of respondents. The California Organization of Police and Sheriffs participated as *amicus curiae* on behalf of the petitioners.

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STATEMENT OF THE CASE

This case began in 1973 when Officers for Justice, an organization of minority and female police officers and applicants, brought suit alleging discrimination based on race and sex in the San Francisco Police Department. The suit was settled when a consent decree was approved on March 30, 1979. *Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801 (N.D.Cal. 1979), *aff'd* 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). The parties to the consent decree are the City and County of San Francisco ("City"), Officers for Justice ("OFJ"), the San Francisco Police Officers' Association ("POA"), and the United States. Prior to entry of the consent decree the district court had found certain of the City's selection procedures for entry level and police sergeant positions to be discriminatory and in violation of federal law. The court had also issued partial summary judgment to the United States with respect to certain of the City's examinations. (Appendix H, 2-3)

The consent decree established no numerical goals or quotas for promotional positions but does require the City to utilize valid, nondiscriminatory promotional selection devices. It states:

> The City shall, except as provided herein, make no further use of . . . any tests, qualifications, standards or other procedures within said Department which have a disproportionately adverse impact against minorities or females, unless and until such standards have been shown to be valid, pursuant to the *Uniform Guidelines on Employee Selection Procedures*, 43 Fed.Reg. 38290, August 25, 1978, or any superceding federal guidelines. (Appendix H, 18)

In 1983 the City gave examinations for promotion to Q-35 Assistant Inspector and Q-50 Police Sergeant. The examinations were in three parts: a multiple choice test measuring technical knowledge and problem solving; a writing skills test; and an oral test measuring ability to communicate, interpersonal qualities, and supervisory abilities. No weighting scheme for utilizing the three components was established prior to administration of the examinations. However, while the examinations were being administered, the City, through its Civil Service Commission, acquiesced to the demands of the POA and set weights for each of the examination components. When the examinations were administered and graded according to the established formula, there was slight adverse impact on women in the assistant inspector examination and substantial adverse impact on minorities in both examinations.

OFJ and the United States challenged the results. A court-appointed expert indicated that the examinations could not be validated under the *Uniform Guidelines*. Evidence presented to the district court showed that incumbent sergeants and assistant inspectors with superior job performance who had pretested the examinations scored so poorly on the basis of the initial weights that they would have had no reasonable chance of appointment in light of the examination results. (Appendix F, 5) Rather than attempt to validate the results, the City established new weights for the examination components. When graded pursuant to the new weights there was no adverse impact on women or minorities. When 120 appointments were made from the eligibility lists based on the revised weights, they included 28 minorities, 16

women and 76 white men. Had the original weights been used the results would have been approximately 12 minorities, nine women, and 99 white men.

After protesting the City's establishment of new weights for the examination components, the Police Officers' Association and three of its members filed an action for declaratory and injunctive relief in the California Superior Court for the City and County of San Francisco. They claimed that the City's action violated the City Charter and rules of its Civil Service Commission. The City removed the action to federal court, which concluded that the Police Officers' Association had attempted to evade the procedures established by the consent decree for resolving disputes over the development and administration of examinations.

Chief Judge Robert F. Peckham ruled that the plan adopted by the City to remedy the adverse impact resulting from the promotional examinations was a permissible affirmative action plan under this Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). The district court concluded that the City's plan was designed to break old patterns which had virtually excluded minorities from the rank of sergeant; did not create an absolute bar to white male employees; was a temporary measure to correct the adverse impact of one set of examinations; and did not unnecessarily trammel the interests of nonminority candidates, in that under the new weighting scheme promotions were based on demonstrable merit and white males still received the vast majority of them. (Appendix F, 7-15)

Following the district court's decision and prior to the Ninth Circuit's first opinion in this case, the parties to the consent decree negotiated a supplement to it, approved by the district court on October 27, 1986. That order prevents the City from changing announced scoring standards after an examination has been given. (Appendix C, 3)

The POA appealed. In its first opinion (of March 12, 1987) the Ninth Circuit concluded that the City had properly thrown out the test results based upon the original weights which generated adverse impact. It noted that under the consent decree and the *Uniform Guidelines,* employers may discard tests that generate adverse impact and may use different selection procedures that do not have an adverse impact as an alternative to validating challenged test procedures. *See,* 29 C.F.R. §1607.6A (1988); *Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures,* 44 Fed.Reg. 11,996, 12,001, Question and Answer n. 31 (1979). The *Uniform Guidelines* require that to validate a selection procedure an employer must consider alternative selection procedures. 29 C.F.R. §1607.3B (1988). In examining alternatives, the employer should also consider alternative methods of using the selection procedure. 29 C.F.R. §1607.5G (1988); 43 Fed.Reg. 38,290, 38,291 (1979). An employer may find that a selection procedure that is valid when scored on a pass/fail basis is invalid when used as a ranking device. 29 C.F.R. §1607.5G (1988). The alternative selection procedure should be used when it has less adverse impact

and when the evidence demonstrates its validity is substantially the same or greater than the challenged procedure. 29 C.F.R. §1607.3B (1988); 44 Fed.Reg. 11,996, 12,003, Questions and Answers Nos. 50-51 (1979). (Appendix D, 9)

The Ninth Circuit noted that the City and the Police Officers' Association agreed that the examination components as reweighted were as job-related as they were under the initial weights. However, the alternative weighting procedure eliminated the test's adverse impact. The Ninth Circuit concluded that the City could not validate the test as originally weighted under the *Uniform Guidelines,* because an alternative selection procedure existed that was equally job related but had no adverse impact. Finding that the City was obligated under the consent decree and the *Uniform Guidelines* to discard the original test results, the court concluded that City Charter and Civil Service rules which prevented the City from complying with the decree and the *Uniform Guidelines* were of no import in light of the Supremacy Clause. (Appendix D, 9-10)

Although concluding that the City was obligated to discard the original test results and could use the examinations in a different manner in order to eliminate adverse impact, the Ninth Circuit nonetheless found that the City violated Title VII when it reweighted the components. It ruled that, "Reweighing unlawfully displaced candidates on the basis of their race and gender." (Appendix D, 13) The Ninth Circuit concluded that the City had taken an inappropriate shortcut in order to remedy the results of the adverse impact of the examinations as originally scored and that the City was obligated

to discard the results of the examinations and devise and administer new selection procedures. (Appendix D, 14-15)

In its second opinion (announced March 24, 1988, following petitions for rehearing), the Ninth Circuit noted that appointments had already been made on the basis of the revised test weights. It found that it would be inequitable to penalize those appointed by ousting them from their positions. *United States v. Navajo Freight Lines*, 525 F.2d 1318, 1326 (9th Cir. 1975). *See, Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561, 579 (1984).

The court held that no individual had the right to displace an incumbent because the original tests were not validated under the consent decree. *Stotts*, 467 U.S. 561, 579. The Ninth Circuit concluded that no further remedy was necessary because the district court's order of October 27, 1986, forbids the City from again reweighting an examination after initial scoring standards had been set. Accordingly, the court dismissed the case as moot. (Appendix C, 2-3)

Following the POA's further petition for rehearing, the Ninth Circuit on March 7, 1989, issued its final opinion which differed from its second opinion only in its conclusion. The court again ruled that because the test was not in compliance with the consent decree, the persons who scored well on it acquired no rights. (*See, Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 484-485 (6th Cir. 1985), *aff'd sub. nom. Local 93 v. City of Cleveland*, 478 U.S. 501 (1986).) The court again concluded that it would be inequitable to remove those persons who were appointed pursuant to the revised weighting

scheme. It noted that the Police Officers' Association had not sought back pay in this action but had simply requested the declaratory relief given by the Ninth Circuit's opinion. Finally, it found that it was unnecessary to order the City to refrain from again reweighting examination components after the original scoring standards had been announced and the examination given. Although the Ninth Circuit ordered no further remedies in this case, it reversed the judgment of the district court. (Appendix A)

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT PETITIONERS HAD OBTAINED ALL THE RELIEF TO WHICH THEY WERE ENTITLED IN THIS ACTION.

In suggesting that the Ninth Circuit improperly denied them remedies to which they were entitled petitioners misstate the Court of Appeals decision and ignore the history of this litigation. Petitioners claim that the Ninth Circuit decision "stands in stark contrast" to decisions of this Court mandating relief for persons who establish that they have been victims of employment discrimination. Petitioners' argument must fail for two reasons. First, petitioners have never established that they are victims of employment discrimination. Second, the Ninth Circuit ordered appropriate relief for the Title VII violation it found.

This action began as a suit for declaratory and injunctive relief in the Superior Court for the City and County

of San Francisco. (Appendix D, 5) The Police Officers' Association sought orders requiring the City to utilize the examination results based upon the original weighting plan, arguing that the San Francisco Charter and applicable Civil Service rules forbid the City from changing the weights assigned to each examination component after the examinations had been administered and scored. The POA did not seek back pay. (Appendix A, 3) The Ninth Circuit affirmed the district court's conclusion that the Supremacy Clause barred the application of City Charter and Civil Service rules to prevent compliance with the consent decree and federal civil rights laws. (Appendix D, 7-10; Appendix G) Petitioners do not challenge that ruling.

Petitioners have not shown that they sought individual remedies for persons allegedly victimized by discrimination in either the district court or the California Superior Court. None of the three individual petitioners has shown that he or she was denied a promotion as a result of the City's actions. In fact, two of them received promotions under the revised scoring plan.

To the extent to which petitioners argue that the original examination weights should have been used and that those who would have received promotions had those weights been used are victims of discrimination, they are wrong on both counts.

The examinations at issue here were given pursuant to a consent decree. After one of the examination components was administered but before the administration of the other two, the City established the weights for each of

the three components. (Appendix F, 4) When the examinations were completed and scored according to the weights set for the individual components, the results demonstrated severe adverse impact for minorities in both ranks and a slight adverse impact for women on one of the examinations. The United States and Officers for Justice (an organization representing minority and female police officers) filed objections under the consent decree. They contended that the examinations were not job related and showed that incumbent inspectors and sergeants, selected because of their superior job performance, had done so poorly when pretesting the examinations that they would have had no reasonable chance of appointment. A court-appointed expert reviewed the selection process and reported that insufficient attention had been paid to the issue of adverse impact, especially with regard to the use of the multiple choice test, and that alternatives which may have minimized such impact were not explored. Following receipt of the court-appointed expert's report, the City decided to withdraw the original examination results and to revise the scoring plan. (Appendix F, 5-6)

This Court's recent decision in *Wards Cove Packing Company, Inc. v. Atonio*, No. 87-1387, ___ U.S. ___ (June 5, 1989), supports the City's decision to discard the original test results. In *Wards Cove*, the Court considered the burdens imposed on an employer when it is established that a specific employment practice results in disparate impact on persons protected under Title VII. (*Wards Cove*, Section III) First, an employer must produce evidence of a "business justification" for the challenged employment practice. The Court noted that, "A mere insubstantial

justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." Moreover, even if an employer successfully produces evidence of a business justification for a challenged practice, those challenging the selection procedure may still prevail if they:

> persuade the factfinder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s];" by so demonstrating, respondents would prove that "[petitioners were] using [their] tests merely as a 'pretext' for discrimination."

See, Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *see also, Watson v. Fort Worth Bank & Trust,* 487 U.S. ___, ___ (1988) (O.Connor, J.).

Prior to this Court's decision in *Wards Cove,* the *Uniform Guidelines on Employee Selection Procedures,* 29 C.F.R. §1607, which provide the standard for the validity of examinations developed pursuant to the consent decree in this case (Appendix H, 18), mandated an identical result. The *Uniform Guidelines* permit employers to use different selection procedures that do not have an adverse impact on minorities and women as an alternative to validating challenged test procedures. *See,* 29 C.F.R. §1607.6A (1988); *Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures,* 44 Fed.Reg. 11,996, 12,001, Question and Answer n. 31 (1979). In order to validate a selection procedure under the *Uniform Guidelines,* the employer must consider alternative selection procedures. 29 C.F.R. §1607.3B (1988).

The City's decision to discard the original test results upon a showing that their use generated adverse impact was therefore consistent with this Court's decision in *Wards Cove* and the *Uniform Guidelines*. Accordingly, the district court and the Ninth Circuit were correct in concluding that the original test results should not be used. "The test itself was not in compliance with the Consent Decree, so the persons who did well on it did not acquire any rights." (Appendix A, 2)

Furthermore, petitioners misrepresent the record when they argue that the Ninth Circuit ordered no relief. The Ninth Circuit concluded that the City violated the consent decree by changing the weighting plan for the examination components. In so doing it emphasized, "The complaint filed by the Officers Association did not seek back pay but the declaratory relief which is here given." (Appendix A, 3) The Ninth Circuit declined to order injunctive relief based upon its finding that the supplemental order of the district court, dated October 27, 1986, protects against the City again setting scoring standards prior to an examination and then changing them after the examination has been administered. (Appendix A, 3)

The petitioners cannot meet their burden of showing that they are victims of employment discrimination under *Wards Cove*. To do so they would first have to make a *prima facie* case by showing that the City's revised selection procedure resulted in a disparate impact on a racial or ethnic group as compared to that group's representation in the qualified applicant pool. (Section II) However, because white males comprised 64 percent of those in the applicant pool and 63 percent of those selected, no such

showing can be made. Although it found that the City had used an improper method of redressing the discriminatory effect of its testing procedures, the Ninth Circuit correctly concluded that no further relief beyond insuring against repetition of the improper practice was appropriate.

The Ninth Circuit did not err in its choice of remedies in light of the violation it found in this case, the relief sought in the pleadings, and the petitioners' failure to prove that they were individual victims of discrimination.

II. PETITIONERS INCORRECTLY STATE THAT THE NINTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

Petitioners argue that the Ninth Circuit's decision in this case directly conflicts with recent decisions of the District of Columbia, Seventh, and Fourth Circuits. However, each of the cases cited by petitioners is easily distinguishable.

In *Dougherty v. Barry*, 869 F.2d 605 (D.C.Cir. 1989), the district court found that the District of Columbia Fire Department had discriminated against several white firefighters when it promoted two black firefighters to positions as deputy fire chief. The Court of Appeals held that the appropriate remedy for the discrimination was to divide the monetary value of the two promotions among the five plaintiffs who had filed timely claims under 42 U.S.C. §1981.

In *Dougherty* the plaintiffs were a group of senior white firefighters who established that two specified

black firefighters had been promoted ahead of them to positions as deputy fire chief because of their race. 869 F.2d 605, 608. The district court found, however, that it could not be established which of the white firefighters would have received the promotions had the black firefighters not been improperly promoted, because promotions were "based on both subjective and objective factors and followed no clear pattern" and all of the plaintiffs were at least minimally qualified. 869 F.2d 605, 614. Because the defendant in *Dougherty* failed to show that any of the plaintiff white firefighters would not have received one of the promotions absent discrimination, the court ruled that they were each entitled to a remedy consisting of "a fraction of the promotions' value commensurate with the likelihood of his receiving one of the promotions." 869 F.2d 605, 615.

The instant case is distinguishable from *Dougherty* in several respects. First, none of the petitioners has established that he or she was subjected to disparate treatment or denied a promotion for which he or she was qualified due to discrimination. In fact, two of the three individual petitioners did receive promotions after the examination components were reweighted. Second, petitioners here sought no monetary relief in their action. Third, the petitioners have not shown that any of the persons who receive promotions did so because of his or her race or sex. In fact, as noted above, 76 of the 120 persons to receive promotions after the test results were reweighted were white males. (Appendix D, 5)

The Seventh Circuit's decision in *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) is entirely inapposite to the instant case. In *Cygnar* 13 Chicago police officers established that they had been transferred from the City's

Office of Municipal Investigations to assignments within the Chicago Police Department because of their race. 865 F.2d 827, 841-842. Although each plaintiff did not suffer specific economic damages, the court concluded that each was entitled to compensatory damages, although the jury's verdict of $55,000 to each plaintiff was found to be excessive. 865 F.2d 827, 847-848.

Likewise, *Lilly v. City of Beckley, West Virginia*, 797 F.2d 191 (4th Cir. 1986) bears little relationship to the instant case. In *Lilly* a white male was refused employment with the Beckley Police Department because the City was eager to hire minorities in order to avoid an imminent threat to law enforcement funding from the federal government and other sources. The district court found that Beckley's affirmative action plan was informal and did not meet the standards of *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). 797 F.2d 191, 193-194. The Fourth Circuit upheld the district court's award of back pay to Lilly. 797 F.2d 191, 196.

In both *Cygnar* and *Lilly* the courts of appeals affirmed damage awards to individuals who showed that they suffered adverse employment actions because of their race. No such showing has been made in this case, nor could it be made. Petitioners claim that those who would have been promoted had the examination results as originally scored been used are victims of employment discrimination. However, such persons held their qualifying positions on the list as a result of the discriminatory impact of the original weights. Nonminorities do not have a legally protected interest in promotions which could only be made pursuant to discriminatory employment practices. *Vanguards of Cleveland v. City of Cleveland*,

753 F.2d 479, 484-485 (6th Cir. 1985), *aff'd sub. nom. Local 93 v. City of Cleveland*, 478 U.S. 501 (1986). When nonminority expectations are based upon a perpetuation of discriminatory practices, a reduction in those expectations does not result in a violation of Title VII. *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983).

Petitioners cannot establish that they were victims of employment discrimination entitled to remedies which the Ninth Circuit declined to give them. Further, petitioners never sought monetary damages in the trial courts in this case and do not represent other individuals who have made claims for damages based upon race discrimination. There is no conflict between the Ninth Circuit's decision in this case and decisions of other courts of appeals.

III. THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF THE DISTRICT COURT IN THE *WILMINGTON FIREFIGHTERS* LITIGATION.

Petitioners erroneously argue that the Ninth Circuit's opinion conflicts with the district court's decision in *Wilmington Firefighters v. City of Wilmington*, 632 F.Supp. 1177 (D.Del. 1986), *dismissed as moot* 824 F.2d 262 (3d Cir. 1987). However, the rulings are entirely consistent except for the Third Circuit's decision that *Wilmington Firefighters* should be dismissed as moot, a conclusion reached by the Ninth Circuit in its second opinion but abandoned in its final decision.

Nonminority firefighters brought a reverse discrimination action against the City of Wilmington, claiming

that the City had discriminated against them by altering the scoring system for promotional examinations after the examinations had been administered. The district court enjoined the City from using the eligibility list based upon the revised scoring standards and ordered it to make promotions based upon the original scoring plan. 632 F.Supp. 1177, 1192-1193.

The first major distinction between the *Wilmington Firefighters* case and the instant litigation is that the district court in *Wilmington* found that the original scoring plan was proper under the particular terms of the consent decree in that case. 632 F.Supp. 1177, 1190; 824 F.2d 262, 264. In the instant case the Ninth Circuit found that the test as originally given was not in compliance with the consent decree. (Appendices A, 2; C, 2-3; D, 14) Because the district court in *Wilmington Firefighters* found that the original scoring standards did not create a selection procedure which violated the consent decree there, it concluded that those who would have been appointed under the original scoring scheme were victims of discrimination entitled to a remedy. In this case the Ninth Circuit found that the City appropriately discarded the initial results and that those who performed well on the test as originally scored were not victims of discrimination.

The conclusion that the examinations given here were invalid was not based simply upon their adverse impact. A court-appointed expert, Dr. Joel Lefkowitz, reported that "insufficient attention was paid to the issue of adverse impact, especially with regard to the use of the multiple choice test and that alternatives which may have

minimized such impact were not explored." (Appendix F, 5) The *Uniform Guidelines* require that such consideration be given:

> Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact.

29 C.F.R. §1607.3B.

Petitioners concede that the selection procedures based on the revised scoring standards are equally valid for the purpose of selecting qualified applicants. "The City and the POA agree that the components when reweighed are as job-related as they were under the initial weights. The alternative weighing procedure eliminates, however, the test's adverse impact." (Appendix D, 9) There can be no doubt that unlike the City of Wilmington, the City and County of San Francisco was required to discard the original test results.

The *Wilmington Firefighters* litigation has little relevance to the instant case. Its relevance is in the reasoning of the Third Circuit, which ordered that the action be dismissed as moot because no further promotions were to be made from the challenged list. 824 F.2d 262, 266. In its second decision the Ninth Circuit ordered that this case be dismissed as moot because the contested promotions had already been made and because the district court's supplemental order embodying the parties' agreement eliminated the possibility that the City would again reweight examination components after initial weights had been announced and the exam administered. (Appendix C, 3) The *Wilmington Firefighters* case supports

the conclusion that only those persons who have shown that they were victims of unlawful employment decisions which denied them positions for which they were qualified are entitled to relief under Title VII. No such showing has been made here.

IV. PETITIONERS MISCONSTRUE THE RECORD BELOW IN ARGUING THAT THE INITIAL EXAMINATION RESULTS AT ISSUE HERE WERE WITHDRAWN SIMPLY BECAUSE THEY SHOWED ADVERSE IMPACT.

Petitioners continue to mischaracterize the record below when they argue that the examination results based on the initial component test weights were withdrawn solely because of their adverse impact. Rather, the results were withdrawn because they demonstrated adverse impact, because the evidence presented to the district court indicated they could not be defended, and because an equally valid selection procedure which did not demonstrate adverse impact was available to the City. The City's determination to withdraw the challenged examination results complied with case law, federal regulations, and the recent decision of this Court in *Wards Cove Packing Company, Inc. v. Atonio*, No. 87-1387, ___ U.S. ___ (June 5, 1989).

The initial examination results demonstrated adverse impact, particularly towards minorities. Although minorities comprised 25.7 percent of those taking the examination for Q-35 Assistant Inspector, they were only 8.0 percent of those who would have been selected had the

original weights been used. Likewise, minorities comprised 25.9 percent of those who took the examination for Q-50 Police Sergeant, but only 10.4 percent of those who would have been selected based on the initial weights. Women comprised 10.2 percent of the applicants for each position, but only 5.3 percent of those who would have been selected for assistant inspector and 9.6 percent of those who would have been selected for sergeant under the initial scoring plan. (Appendix D, 3-4) While this evidence of adverse impact is not sufficient to establish that the examinations were illegal, it is sufficient under this Court's recent decisions to make out a *prima facie* case of disparate impact. *Wards Cove*, Section IIIA; *Watson v. Fort Worth Bank & Trust*, 487 U.S. ___, ___ (1988) (O'Connor, J.). Absent a showing of validity, the statistical disparities represented here would have established discrimination under the *Uniform Guidelines*. 29 C.F.R. §1607.3A. ("The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of Section 6 below are satisfied.")

Second, the evidence before the district court indicated that the initial examination results could not be validated.

> The [district] court appointed Dr. Joel Lefkowitz, an expert industrial psychologist, to review the selection process. Dr. Lefkowitz reported that insufficient attention was paid to the issue of adverse impact, especially with regard to the use of the multiple

> choice test and that alternatives which may have minimized such impact were not explored.

(Appendix F, 5) "The evidence uncovered during discovery and the findings of Dr. Lefkowitz prompted extensive settlement negotiations between the Consent Decree plaintiffs and the City." (Appendix F, 5) These negotiations led to the City's decision to establish new scoring standards. (Appendix F, 6) This result was compelled not only by the conclusions of the court-appointed expert, but by the *Uniform Guidelines* themselves.

> Accordingly, whenever a validity study is called for by these guidelines, the user should include, as part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines.

29 C.F.R. §1607.3B. The expert's finding that insufficient attention was paid to adverse impact and that alternatives which may have minimized such impact were not explored virtually guaranteed that the initial scoring system could not be validated.

Finally, the City's subsequent actions led to the development of a selection procedure which had little adverse impact and was concededly valid for selecting police sergeants and assistant inspectors. Under the revised scoring plan minorities comprised 22.3 percent and women 11.1 percent of those selected to positions as Q-35 Assistant Inspector, as compared with 25.7 and 10.2 percent respectively in the applicant pool. For the position of Q-50 Police Sergeant, minorities comprised 24 percent and women 14.6 percent of those selected, as

compared with their respective representations of 25.9 percent and 10.2 percent in the applicant pool. (Appendix D, 3-5) Moreover, "The City and the POA agree that the components when reweighed are as job-related as they were under the initial weights." (Appendix D, 9)

The procedure followed by the City appears thoroughly consistent with this Court's recent decision in *Wards Cove v. Atonio*. On the facts presented, the City may have been able to satisfy its burden to produce evidence that the examinations as originally scored served a legitimate employment goal. (*Wards Cove*, Section IIIB[1].) However, those challenging the examinations could then have shown that other tests or selection devices, which would not have generated adverse impact, would also have served the City's interests. Then the City would have found itself in the position of the employer discussed in *Wards Cove:*

> If respondents, having established a *prima facie* case, come forward with alternatives to petitioners' hiring practices that reduce the racially-disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.

(*Wards Cove*, Section IIIB[2].)

Not only was the City required to utilize a different selection procedure rather than use the test results as originally weighted, but its decision to reweight the test components seems consistent with the *Uniform Guidelines*.

> The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if

> that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis.

29 C.F.R. §1607.5G. The use of the original examinations with a different scoring plan was justified as a way to minimize adverse impact while maintaining the integrity of the examination process.

The Police Officers' Association has conceded that the examinations as reweighted remained job related. The district court made extensive findings on this issue. It noted that all three components of the examinations were maintained and that cutoff scores for the multiple choice components were set five points above the level of minimum competency. (Appendix F, 12) The writing skills component was also established as a screening device and its use eliminated approximately 25 percent of the applicants for each position. (Appendix F, 13) The oral component was used as the sole ranking device and was highly structured to accurately measure interpersonal skills. The Police Officers' Association's own expert testified that the structured interview was objective and enhanced the reliability of the examination. The district court found that it fairly measured supervisorial skills, oral communication skills, and interpersonal skills, three of the five dimensions identified by the job analysis as

important in the successful performance of the jobs of both assistant inspector and police sergeant. (Appendix F, 13-14)

The results of the examination with the new scoring plan did not eliminate white males from consideration. In fact, they received 76 of 120 positions, as opposed to approximately 99 of 120 under the original weighting scheme. (Under the original plan white males could expect to receive 87 percent of the 45 positions as assistant inspectors and 80 percent of the 75 positions as sergeants.) It is therefore apparent that although the reweighting plan eliminated the adverse impact that flowed from the original scoring procedure, its impact on the opportunities available to white males was comparatively slight. Petitioners are incorrect when they argue that the Ninth Circuit equated disparate impact with invalidity.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari filed in this case should be denied.

DATED: July 5, 1989

Respectfully submitted,

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No. 88-1984

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SAN FRANCISCO POLICE OFFICERS ASSOCIATION, LYNNE A. TORRES, LILLIAN CHAI MATTOCH, and HENRY KIRK,
Petitioners,

VS.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; CIVIL SERVICE COMMISSION; LOUIS HOP LEE, REVEREND DR. HOWARD S. GLOYD, CARLOTA TEXIDOR DEL PORTILLO, GENEVIEVE W. POWELL, and A. LEE MUNSON,
Respondents.

RESPONSE OF INTERVENORS TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Title VII (42 U.S.C. § 2000e *et. seq.*) mandate relief for unidentified non-minority workers following abandonment of an anonymous, potential promotion eligibility list found to be invalid under Title VII and a Consent Decree?

2. When the relief originally requested by plaintiffs is no longer possible, must an appeals court finding in plaintiffs' favor grant alternative relief first raised by plaintiffs on the second rehearing of the appeal?

THE PARTIES

Officers for Justice (OFJ), the National Association for the Advancement of Colored People, Western Region (NAACP), Chinese for Affirmative Action, the National Organization for Women, and the League of United Latin American Citizens are respondent-intervenors in this case. Officers for Justice is a recognized bargaining unit for San Francisco police officers, composed primarily of minority and women officers. The NAACP is a national organization devoted to the promotion of equal rights for all persons. Chinese for Affirmative Action is an organization created to work for equal opportunity for Americans of Chinese heritage. The National Organization for Women works for the improvement of the status of women in American society. The League of United Latin American Citizens is a group working to promote the interests of Latin American citizens. These organizations (hereinafter referred to collectively as OFJ) were the organizational plaintiffs in the underlying suit in this action, *Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). Collectively they act as class representatives for all women and minority applicants and employees in the San Francisco Police Department.[1]

Petitioners are the San Francisco Police Officers Association, Lynne A. Torres, Lillian Chai Mattoch, and Henry Kirk. The Association is a labor organization representing most police officers in their employer-employee relations with the City of San Francisco. Petitioner Torres is a Hispanic woman who was promoted from the revised promotional eligibility list described herein. Petitioner Mattoch is an Asian woman who was promoted

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[1] It is only through an odd twist of procedure that Petitioners came to be the plaintiffs in this case. In order to avoid the federal court, Petitioners originally filed this case in state court and avoided stating any federal claims in their complaint under which removal to federal court would be proper. Nonetheless removal was accomplished under the Civil Rights Removal Act, 28 U.S.C. § 1443. OFJ was granted full party intervenor status of right to defend the City's actions, taken under a Federal Consent Decree.

from the revised promotional eligibility list described herein. Petitioner Henry Kirk is a black male police officer.

Respondents are the City and County of San Francisco, a municipal corporation; its Civil Service Commission; and Commissioners Louis Hop Lee, Reverend Dr. Howard S. Gloyd, Carlota Texidor Del Portillo, Genevieve W. Powell, and A. Lee Munson.

The California Organization of Police and Sheriffs participated as Amicus Curiae on behalf of the Petitioners. The Department of Justice of the United States participated as Amicus Curiae on behalf of the Respondents.

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No. 88-1984

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,
LYNNE A. TORRES, LILLIAN CHAI MATTOCH,
and HENRY KIRK,
Petitioners,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation;
CIVIL SERVICE COMMISSION; LOUIS HOP LEE,
REVEREND DR. HOWARD S. GLOYD,
CARLOTA TEXIDOR DEL PORTILLO,
GENEVIEVE W. POWELL, and A. LEE MUNSON,
Respondents.

RESPONSE OF INTERVENORS TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Intervenor-Respondents Officers for Justice respectfully ask that Petitioners' request for a Writ of Certiorari be denied. In the alternative, Officers for Justice prays that this Court grant the petition and vacate the opinion below as moot.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is reported at 869 F.2d 782 (9th Cir. 1988). The order denying

Petitioners' Petition for Rehearing and Rejecting the Suggestion for Rehearing *en banc* is not reported.

Two previous opinions of the Court of Appeals in the same proceeding are reported at 842 F.2d 1126 (9th Cir. 1988) and 812 F.2d 1126 (9th Cir. 1987). The Court's order vacating its 1987 opinion is not reported. The memorandum decisions of the District Court for the Northern District of California are reported at 621 F.Supp. 1221 (N.D. Cal. 1985) and 621 F.Supp. 1225 (N.D. Cal. 1985). The order of the United States District Court approving the Consent Decree and the Consent Decree are reported at 473 F.Supp. 801 (N.D. Cal. 1979).

JURISDICTION

Petitioners invoke the jurisdiction of the Court to review the Judgment of the Ninth Circuit under 28 U.S.C. § 1254(1). Two factors, however, deprive the Court of jurisdiction over this case. First, the parties before the court lack standing to represent the claims of the alleged white male victims of "reverse discrimination." Petitioners Torres and Mattoch have received the promotions they sought. Petitioner Henry Kirk, a black male, by definition cannot be a victim of the alleged discrimination against non-minority candidates for promotion. This case has not been certified as a class action, and none of the petitioners can claim to represent the group of white males allegedly injured as a result of the reweighting of the examinations.

This case is also moot. The only relief requested by Petitioners in the trial court and in the first two hearings before the Ninth Circuit was injunctive and declaratory relief to stop the City from using the promotional eligibility list created from the reweighted examinations. Petitioners' claims for individualized relief should not be heard, as petitioners' failure to raise these claims in the trial court and in the initial appeal has necessarily precluded any defense to these claims, in pleading as well as at trial, by Respondents.

The City has already made its appointments from the reweighted list, and has agreed not to reweight any future test results. Under the principles governing relief in Title VII cases,

the current appointees cannot be removed from their positions. *Wygant v. Jackson Board of Education,* 476 U.S. 267, 282 (1986); *Firefighters v. Stotts,* 467 U.S. 561, 579 (1984). The issue of injunctive relief, the only issue properly before this court, is therefore moot.

STATUTES INVOLVED

42 U.S.C. § 2000e-2(a). Employer practices.

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-5(g). Injunction; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated

against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

This case actually began in 1973 when Officers for Justice brought suit alleging discrimination based on race and sex in the San Francisco Police Department. Following findings of deliberate racial and sexual discrimination in hiring and promotions, the suit was settled by a Consent Decree on March 30, 1979. *Officers for Justice v. Civil Service Commission,* 473 F. Supp. 801 (N.D. Cal. 1979), *aff'd,* 688 F.2d 615 (9th Cir. 1982), *cert. denied,* 459 U.S. 1217 (1983). The Consent Decree was signed by the City of San Francisco, Officers for Justice (representing class members, minority and female police officers and applicants), the San Francisco Police Officers Association, and the United States.

The decree requires the City to employ good faith efforts to achieve particular goals for the employment and promotion of women and minorities in the police department. It prohibits the use of methods of selection that have an adverse impact on women and minorities unless the City proves they are valid under the *Uniform Guidelines on Employee Selection Procedures,* 29 C.F.R. § 1607.

In 1983 the City gave examinations for promotion to Q-35 Assistant Inspector and Q-50 Sergeant. The examinations were in three parts: a multiple choice test measuring technical knowledge and problem solving; a writing skills test; and an oral test measuring ability to communicate, interpersonal qualities, and supervisory abilities. The Police Department's Consent Decree Division Coordinator and the test consultant advised that no weights be set for the examination components until after the

examination had been given and the results analyzed.[2] However, after the multiple choice section of the examination had been given, but before the other two components, the Police Officers Association lobbied for certain weights to be set for all exam components in the middle of the examination administration. The Consent Decree Coordinator, the District Court's Consent Decree Auditor-Monitor, the test consultant, and all parties to the Consent Decree other than POA objected to the proposed weighting on the grounds that it was unnecessary and premature, and would almost certainly result in preferential selection of white males for promotion. The Civil Service Commission nevertheless adopted the POA's proposed weighting system.

The examinations were then completed and the results tabulated by race and sex without revealing the identities of the candidates as listed.[3] Using the component weightings requested by POA, the Q-35 examination had an adverse impact on women and both examinations had a substantial adverse impact on minorities. Rather than attempt to validate a set of testing weights that had a proven adverse impact on minorities and women, the City chose to revise its selection procedure, as permitted by the *Uniform Guidelines*. *See* 29 C.F.R. § 1607.6A (1986); Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11996, 12001, Question and Answer n. 31 (1979).

Because the City determined not to use the test results reflecting adverse impact, it never carried out the screening needed to determine which individuals would actually receive promotions

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[2] This is a standard practice in unique examinations devised for one-time use, in order that errors in test development—inaccurate answers, ambiguous instructions or questions, and exercises that do not effectively screen or differentiate candidates—can be resolved *before* putting weights on the as yet unfinalized components. Moreover, every examination composed of different parts will have a universe of possible weightings, all defensibly valid as predictors of performance.

[3] This anonymous tabulation is required by the Consent Decree. *See* Consent Decree, paragraph 15, 473 F.Supp. 801 at 820.

based upon those test results.[4] No one has ever identified the individuals who might have received appointments as Sergeants or Assistant Inspectors had the City decided to make its appointments from a list based upon the original weights. Petitioners' motion to obtain the names attached to the original rankings was denied in March of this year. Petitioners filed that motion only after the filing of their second petition for rehearing in the Ninth Circuit—the petition which first raised the issue of individualized relief. While POA asserts that it represents the interests of 51 unnamed individuals who allegedly lost their promotions when the examination components were reweighted, it must be noted that no one can even claim to know that there are 51 such individuals, or who they are.

Using a new formula to weight the results of the different test components, the Civil Service Commission created a new list which eliminated adverse impact against women and minorities. The City Attorney explicitly stated that the new weights were no less valid for the examinations than the original weights. Ultimately 120 persons were appointed as Sergeants and Assistant Inspectors. Of this group 76 were white males, 28 were minority group members, and 16 were women. The percentage of white males promoted from this list was almost exactly equal to the percentage of white males in the applicant group. Petitioners have never claimed that the examination, as reweighted, was in and of itself unfair to white males. It was not. They have only challenged the process used to arrive at the new weightings.

The POA originally challenged the City's adoption of the revised weighting in an action filed in state court, on the grounds that the changes made violated the time limit for rehearing set by

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[4] Applicants who take an exam frequently do not receive appointment due to after-occurring events such as disability or retirement, or because of ineligibility due to discipline, or because the putative eligible list has to be revised after publication, following correction of errors and protests and appeals by test applicants under Civil Service procedures and rules. Accordingly, even when published with names, such a list is only denominated as "tentative," pending further review. The list at issue here never even reached the "tentative" stage.

the San Francisco Civil Service Rules. The complaint sought only injunctive and declaratory relief to prevent the city from using the newly reweighted exam results.

The case was moved to Federal court, and following preliminary proceedings, Chief Judge Peckham ruled on March 14, 1985, that the Supremacy Clause of the United States Constitution allowed suspension of the Civil Service Rule when required for compliance with Title VII and the Consent Decree. *City and County of San Francisco v. San Francisco Police Officers Association,* 621 F.Supp. 1225 (N.D. Cal. 1985).

Following trial, Judge Peckham issued a second opinion holding that the reweighting procedure constituted a valid affirmative action plan under the standards of *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), and ordered that the long delayed apppointments be made. *San Francisco Police Officers Association v. City and County of San Francisco,* 621 F.Supp. 1221 (N.D. Cal. 1985). Judge Peckham dissolved a preliminary injunction. The Ninth Circuit Court of Appeals and this Court refused to grant stays pending appeal. In March, 1986, the City completed the administrative and procedural work and made the appointments. The exam and the list then expired under Civil Service Rules.

On appeal the Ninth Circuit initially ruled on March 12, 1987 that the City had engaged in impermissible, race-conscious action which unnecessarily trammeled the interests of non-minority police officers when it reweighed the examination components. *San Francisco Police Officers Association v. San Francisco,* 812 F.2d 1125, 1131 (9th Cir. 1987). However, the Ninth Circuit also ruled that the initial weights were invalid, due to their adverse impact on minorities and women, and that the decision not to use these weights was required by the Consent Decree. 812 F.2d at 1130 and n.6. Finding that the City intended to weigh future promotional examinations in the same manner challenged there, the Court initially concluded that the POA's appeal was not moot. 812 F.2d at 1128. The case was remanded to the District Court for development of a valid selection device for promotions.

Both parties petitioned for rehearing. By an Order dated August 17, 1987, the Ninth Circuit denied the petitions for rehearing and suggestion for rehearing *en banc*. By the same Order the Circuit Judges vacated their first opinion and informed the parties of their intention to file an amended decision, reversing the District Court and permitting those officers already promoted to remain in their positions. The vote of the panel judges, the outcome and the relief were set out, but no reasoning or opinion accompanied the Order.

The promised decision was never issued. Instead, in March 1988, the Court issued a second opinion dismissing the appeal as moot. *San Francisco Police Officers Association v. City and County of San Francisco,* 842 F.2d 1126 (9th Cir. 1988). The Court concluded:

> (1) that it would be inequitable to remove those police officers who were promoted pursuant to the revised weighting scheme, citing *Firefighters v. Stotts,* 467 U.S. 561, 579 (1984);
>
> (2) that no individual could claim a position as the result of the original weighting scheme, which was never validated as required by the Consent Decree;
>
> (3) that as a result of a supplemental order of the District Court entered on October 26, 1986, the City stipulated, *inter alia*, that it would not again reweight an examination after scoring standards had been set and the examination administered.

Petitioners then filed another Petition for Rehearing and Suggestion for Rehearing *en banc*, suggesting for the first time in the case the possibility of individualized relief such as back pay or promotional rights. The Ninth Circuit's third and final opinion, in March, 1989, properly rejected this suggestion. *San Francisco Police Officers' Association v. City and County of San Francisco,* 869 F.2d 1182 (9th Cir. 1989). The Court held again that the test as originally weighted was not in compliance with the Consent Decree, and that therefore no one had acquired any rights as a result of that test. While the reweighting procedure was once again held to be invalid, the Court again recognized that no relief

(other than declaratory relief) was appropriate: the City had agreed not to reweight any test scores in the future, and the officers promoted from the revised list could not fairly be ousted from their jobs. Back pay had not been requested in the original complaint and could not be granted after a request so late in the proceedings. The Court reversed the District Court's opinion but did not remand, in light of the absence of an appropriate remedy.[5]

ARGUMENT

A. Reasons for Denying the Writ

1. Petitioners do not have standing to represent the claims of the non-minority victims of the alleged "reverse discrimination."

Petitioners' claims are based on the charge that the City of San Francisco engaged in illegal "reverse discrimination" by reweighting the results of the Q-35 and Q-50 promotional examinations to eliminate the adverse impact on women and minority candidates. However, none of the parties in this case can claim to be one of those harmed by this alleged discrimination or to represent those harmed.

In order to have standing to pursue a claim, "plaintiffs must allege some threatened or actual injury resulting from the putative illegal action[.]" *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). *See also Baker v. Carr*, 369 U.S. 186, 204 (1962); *Flast v. Cohen*, 392 U.S. 83, 101 (1968). None of the individual plaintiffs in this case was injured as a result of the supposed "reverse discrimination." Petitioners Torres and Mattoch were both promoted as a result of the City's use of the revised eligibility list. Petitioner Kirk's scores on the examinations were apparently so low that it is unlikely he would have been promoted using any set of examination weights.

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[5] The Court of Appeals did invite an attorneys' fee application in that Court from the POA. This was odd, as the POA had never requested fees. Moreover, the POA had had fees awarded *against* it in the trial based, in part, on its violations of the Consent Decree, in the manner in which it prosecuted this case, quite apart from the Title VII substance.

Plaintiffs must also show a sufficient nexus between the injuries alleged and the alleged violation. *Allen v. Wright*, 468 U.S. 737, 757-758 (1984); *Linda R.S. v. Richard D.*, 410 U.S. at 618. The injury must be one that will be redressed by a favorable decision. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42 (1976). In this case, all three individual petitioners are members of minority groups: Lynne Torres is a Hispanic woman, Lillian Chai Mattoch an Asian woman, and Henry Kirk a black man. It is hard to understand how they can claim to be victims of what Petitioners characterize as discrimination in *favor* of minorities and women. Even if plaintiffs had alleged some cognizable injury, related in some way to defendants' actions, they could not link that injury to *employment discrimination*, the alleged violation.

The individual Petitioners in this case have no claim to represent those who were supposedly harmed. This case was not filed as a class action. Petitioners have never sought to certify the action as a class action or to assert any claims on behalf of anyone but themselves. Moreover, all of the petitioners are particularly ill suited to act as representatives of the alleged victims. Lillian Mattoch and Lynne Torres are both minority women who were promoted from the revised list. They cannot possibly assert claims for the individuals who were not promoted, since they can never meet the standards of typicality. Federal Rules of Civil Procedure 23(a)(3). The remaining named plaintiff, Henry Kirk, is also a member of a minority group. As noted above, it is unlikely that his place on the original list would have earned him promotion. He, too, would be a poor representative for the white males who placed well on the original list. Lacking standing on their own behalf, Petitioners cannot acquire standing by asserting the claims of others. *Allee v. Medrano*, 416 U.S. 802, 828-829 (1974) (Burger, C.J., concurring in the result and dissenting in part).

The Police Officers Association also lacks standing to pursue the claims of the alleged victims of discrimination. Defendants' actions have not harmed the POA as an organization. The POA can only claim standing on the basis of injury to its members. It is true that the Police Officers Association, as a union representing some San Francisco police officers, may count among its mem-

bers some or all of those unidentified white males who might have been promoted had the original rankings been used. As an organizational plaintiff, however, POA cannot ask for individualized relief, such as back pay, that will not benefit its members as a group. They can only request injunctive or declaratory relief—relief which is no longer possible in this case. *Warth v. Seldin*, 422 U.S. 490, 515-516 (1975).

Moreover, the membership of POA includes both those individuals who were promoted from the revised list and a large number of officers who seek the chance to compete for the promotions which the POA seeks to reserve for the alleged victims of discrimination. Some of these officers are already preparing for the new set of promotional examinations that the City plans to administer later this year. The relief the POA seeks will benefit some of their members and do direct harm to others. Just as the individual Petitioners could not serve as class representatives, the POA cannot act as a class representative due to these conflicts of interest among its members. The POA is in an irreconcilably conflicted position, trying to represent a small number of members who would understandably be happy to win promotions in this lawsuit to the detriment of the other officers on the force. The POA has no power or right to attempt to adjudicate someone else's legal claims in order to keep its own lawsuit alive.

2. The case is moot.

When a court is unable to grant any effective form of relief, the case is moot. *Mills v. Green*, 159 U.S. 651, 653 (1895); *Hall v. Beals*, 396 U.S. 45, 48 (1969). In the present case, Petitioners' claim for injunctive relief cannot be granted. The City has already made appointments from the revised list. As the Ninth Circuit recognized, those persons appointed pursuant to the reweighting scheme are innocent of wrongdoing and it would be inequitable to penalize them by removing them from their positions. This Court has consistently held that even those workers who hold their jobs as the result of the discriminatory practices of their employers cannot be removed from their positions in order to provide relief to the victims of the discrimination. In *Wygant v. Jackson Board of Education*, for example, this Court found that layoffs were not

permissible as part of the relief offered to plaintiffs, because they imposed too much of a burden on particular individuals. 476 U.S. 267, 282 (1986). *See also Firefighters v. Stotts*, 467 U.S. 561, 579 (1984). Principles of equity govern the decision of what relief is appropriate. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 375-376 (1977). In this case, it would be unfair to both the individuals involved and the City of San Francisco, as it attempts to maintain an effective police force, to remove those Sergeants and Assistant Inspectors who have already been appointed. What has been done cannot be undone; the use of the reweighting scheme cannot be enjoined when it has already been used.

An injunction to prohibit future reweightings of examination components would be pointless. The District Court has issued a Stipulated Supplemental Order, dated October 27, 1986, which reformed in its entirety the creation, administration and scoring of promotional examinations. That revised procedure necessarily prohibits the City from setting scoring standards before a test and changing them after the test has been given. The City stipulated to the entry of that Order and is bound by it. Another injunction saying the same thing would have no effect. Moreover, the City is in the midst of preparing a new set of examinations for other positions to be administered later this year.

This Court should not consider Petitioners' claims for other forms of relief, such as back pay or rights to future promotions. Throughout most of its history, this case has proceeded solely on theories related to prohibitory injunctive relief. The original complaint was framed solely in terms of invalidating the reweighing decision. All proceedings in the District Court focused solely on this theory and this relief. Indeed, the trial itself, with plaintiffs as the moving parties controlling the litigation, was devoted solely to whether the reweighting was permissible. Plaintiffs have conducted *no* discovery, presented *no* evidence, and offered *no* argument to support theories that specific, unnamed individuals are entitled to individualized forms of relief. Defendants have had no opportunity to present evidence relating to these new theories of relief. This record is utterly devoid of any evidence or material even to calculate what the damages might have been or who the

individuals are. If plaintiffs desired such relief it was incumbent upon them to put it in the record as part of their case. Up until the second rehearing before the Ninth Circuit, this case always proceeded on the basis that plaintiffs were seeking affirmative prospective relief directed to altering defendants' conduct.

Appellate courts will ordinarily not consider issues not raised below. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Regents of University of California v. Bakke*, 438 U.S. 265, 283 (1978); *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 821-822 (1986) (O'Connor, J., dissenting). The decision of whether to consider a question not raised below is left to the discretion of the Courts of Appeals, to be exercised in consideration of serving the ends of justice. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). In this case, the Ninth Circuit properly exercised its discretion. Consideration of Petitioners' belated claims for individualized relief would be unfair. This Court should similarly refuse to hear these claims. As no injunctive relief can be granted and other forms of relief were not requested below, this case is moot.

3. No individual has the right to be appointed as the result of an unvalidated discriminatory test.

The persons who scored highest on the examinations prior to the reweighting have no rightful claim of being victims of employment discrimination.[6] The unidentified 51 for whom POA now

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[6] Under well settled Title VII case law, an examination with adverse impact is not merely discriminatory but *presumptively invalid*. Only if validity is established can that presumption be overcome. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Validity of the original weights has never been established, or even alleged by the POA. It only alleged the reweighting was unlawful. Moreover, discriminatory weights are disfavored and unlawful where a second set of weights is available that would be equally valid but without adverse impact. 29 C.F.R. § 1607.3B (1988); 44 Fed. Reg. 11996, 12003-04, Questions and Answers Nos. 50-51 (1979). The City has admitted the second weights were equally valid. Therefore, under Title VII and the *Uniform Guidelines*, the validity of the original weights is irrelevant and the second weights *must* be used.

purports to litigate held their supposed positions only as the result of a weighting system that has consistently been held to be invalid under the Consent Decree and Title VII by both the District Court and the Court of Appeals. Nonminorities do not have a legally protected interest in promotions which could only be made pursuant to discriminatory employment practices. This Court has held that it is permissible for employers to take affirmative action to correct traditional patterns of discrimination. *United Steelworkers v. Weber*, 443 U.S. 193, 204 (1979). It is impossible to aid minorities in this way without adversely affecting the previous expectations of non-minorities. This Court recognized that fact in *Johnson v. Transportation Agency of Santa Clara County*, holding that denying a promotion to a white male as part of a legitimate affirmative action plan does not violate Title VII. 480 U.S. 616 (1987). When nonminority expectations are based upon a perpetuation of discriminatory practices, a reduction in those expectations does not result in a violation of Title VII. This Court has noted that where layoffs are not involved, innocent individuals may have to bear the burden of achieving equal employment opportunity. "Denial of a future employment opportunity is not as intrusive as loss of an existing job." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-283 (1986).

Furthermore, no individual petitioner can show that he or she would have been appointed but for the reweighting of the eligibility test. The names attached to the original rankings have never been released. Even if they had been, further work would have been necessary to determine who would have received the appointments from that list: applicants must be screened to determine whether they meet the other requirements for promotion. Mattoch and Torres have been promoted, and so certainly are not members of the group of people harmed by the reweighting. Petitioner Kirk has no way of knowing whether he would have been promoted using the original weights, and has stated in deposition that he does not know.

At best, Petitioners are in the posture of the plaintiff in *Johnson, supra*. In rejecting his claim, this Court pointed out:

> In addition, petitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classi-

> fied as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner. Furthermore, while the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.

480 U.S. 616, 638.

In *Albemarle Paper Co. v. Moody* 422 U.S. 405, 418 (1975) this Court stated: "Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " (Quoting *Louisiana v. United States* 380 U.S. 145, 154 (1965)). The City's decision to withdraw potential eligibility lists based on invalid weights was consistent with the Supreme court's directive in *Albemarle Paper*. No person can claim to be a victim or to deserve a remedy as a result of not being promoted through a discriminatory examination process. Because the unidentified white males whose interests appellants claim to represent could only have been appointed as the result of an invalid discriminatory exam, they cannot claim to be victims of employment discrimination. Accordingly, they are entitled to no remedies in this action.

The Consent Decree specifically forbids the City from using tests or other selection criteria that demonstrate an adverse impact "unless and until" the City proves the procedures are valid under the *Uniform Guidelines*. Consent Decree, paragraph 4, 473 F.Supp. 801 at 812. Rather than validate a test that had a proven adverse impact on minorities and women, the City chose to revise its testing procedure. The *Uniform Guidelines* permit employers to use different selection procedures that do not have an adverse impact on minorities and women as an alternative to validating challenged test procedures. 29 C.F.R. § 1607.6A (1988); Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11996, 12001, Question and Answer n. 31 (1979). Furthermore, the *Uniform Guidelines* required the

City to discard the challenged procedure and to consider alternative selection procedures when faced with a testing device demonstrating adverse impact. 28 C.F.R. 1607.3B (1988). *See, Bushey v. New York Civil Service Commission*, 733 F.2d 220, 226-228 (2nd Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985). The rescoring scheme upheld in *Bushey* was explicitly based on race, adjusting the raw scores of minority candidates upwards. By contrast, the reweighting scheme used by San Francisco treated all applicants alike, regardless of race or sex.

In examining alternatives, the employer should also examine alternative methods of using a selection procedure. 29 C.F.R. § 1607.5G (1988); 43 Fed. Reg. 38290, 38291 (1979). The alternative selection procedure should be used when it has less adverse impact and when the evidence demonstrates that its validity is substantially the same or greater than the challenged procedure. 29 C.F.R. § 1607.3B (1988); 44 Fed. Reg. 11996, 12003-04, Questions and Answers Nos. 50-51 (1979).

In this case the POA has never challenged the job-relatedness of the components as reweighted. The alternative weighing procedure eliminated the test's adverse impact. Under the *Uniform Guidelines*, the City was prohibited from validating the tests, because an alternative selection procedure existed that was equally job-related but had no adverse impact.

Petitioners have not challenged the reweighted test as being discriminatory in and of itself. Indeed, the percentage of white males in the group of those appointed from the reweighted list is almost exactly equal to the percentage of white males in the applicant group. It is only in comparison to the original list that white males are disadvantaged. Given that that list has been held invalid by both courts below, there is no reason for that comparison to be made. Thus Petitioners cannot legitimately contend that employees who would have received promotions had the original weighting scheme been used are victims of unlawful employment discrimination entitled to any remedy from this Court.

4. The decision of the Ninth Circuit does not conflict with the decisions of this Court or with those of other circuits.

Petitioners cite *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) to support the proposition that all victims of Title VII employment discrimination must be granted relief, claiming that the only difference between the plaintiffs in those cases and the Petitioners here is that the "discriminatees" in this case are non-minorities. In fact, the holding in *Albemarle Paper* supports the Ninth Circuit's refusal to grant individualized relief. The other cases cited have little bearing on the issues in this case, and do not dictate another result.

In *Albemarle Paper*, the Court held that given a finding of unlawful discrimination, an award of back pay should be denied only for reasons which, if applied generally, would not frustrate the central purposes of the employment discrimination statutes. 422 U.S. at 421. In that case, as here, one reason for the district court's refusal to award back pay was the plaintiffs' failure to request it in their original complaint. The issue was remanded to the district court for a decision on the factual issue of whether the plaintiffs' lateness in raising their back pay claims had prejudiced the defendants. If the district court found that it had, they could refuse to award back pay.

In this case, Petitioners' failure to raise their claims for individualized relief clearly prejudiced Respondents by denying them the chance to build a case against these claims.[7] To deny relief that plaintiffs fail to request will surely not defeat the purposes of Title

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[7] Not only have defendants been unable to defend against the damages claim, but Petitioners now come to the Supreme Court to demand entitlement to relief without affording Respondents the opportunity to present evidence in the trial court or any legal argument in the trial court or in the Court of Appeals. Defendants have not had the opportunity to present any defenses which might have been available had Petitioners raised the claim for damages earlier in the proceedings. For example, the Answer is devoid of procedural defenses to damages simply because the Complaint did not ask for damages. In effect, the plaintiffs ask to redraft

VII; it simply asks that Title VII plaintiffs, like any plaintiffs, let the court know what they hope to achieve in their lawsuit. In addition, there are other reasons here which support the denial of relief. As described above, Petitioners had no right to the promotions made, and so have no right to relief.

In *Franks v. Bowman* this Court held that discrimination victims may be awarded retroactive seniority status as part of their relief. 424 U.S. at 779. The Court also noted that district courts are given broad discretion to fashion remedies for successful Title VII litigants. 424 U.S. at 770. This discretion may cut both ways, however. In the present case, principles of equity supported the denial of relief. In addition, by reiterating that the fashioning of a remedy is generally left to the district courts, the Court did not deny the Courts of Appeals the power that the Ninth Circuit has exercised here, to decide as a matter of law that no relief may fairly be granted.

Similarly, the holding in *Teamsters* does not apply to the present case. The Court held in *Teamsters* that a finding of discrimination creates a presumption of relief for members of the "affected class" of discriminatees, placing the burden on the employer to show that any particular class member was not a victim of discrimination. 431 U.S. at 362. In this case, however, the alleged victims had no right to the promotions they claim, and so have no right to "make-whole" relief based on the assumption that they deserved these promotions. Furthermore, none of the white male victims of the alleged discrimination are before the court, nor is there any party in this case who can claim to represent this group. The Court simply has no power to grant relief to people who are not parties to the case. Finally, even if these men were parties in this case, their failure to request individual relief in a timely manner would block them from claiming it at this stage in the proceedings. The *Teamsters* presumption of relief simply does not apply.

Petitioners claim that if they had been minorities, they would have received relief. In reality, the weakness of their legal claims

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their complaint after the case is over, without giving defendants a chance a plead in response.

and the procedural problems presented by this case would have blocked relief no matter what the race or sex of the plaintiffs. *Albemarle, Franks v. Bowman*, and *Teamsters* simply do not speak to the many weaknesses in Petitioners' case.

Petitioners' citations to the cases of other Circuits are also inapposite. *Dougherty v. Barry*, 869 F.2d 605 (D.C. Cir. 1989), *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) and *Lilly v. City of Beckley, West Virginia*, 797 F.2d 191 (4th Cir. 1986) are all cases which apply Title VII law to instances of "reverse discrimination," in which white males were harmed. None of them have any further application to the legal and procedural difficulties in this case.

In *Dougherty*, white firefighters were passed over for promotion to the position of deputy fire chief on the basis of their race. Judge Ginsburg applied the holding of *Teamsters* and found that the city of Washington had the burden of proof to show that particular individuals would not have been promoted in the absence of discrimination and therefore should not receive relief. There was no question as to the proper parties being before the court—eight white firefighters who were denied promotion had brought the suit. Plaintiffs had requested monetary relief, so mootness was not a problem. Finally, the challenged promotions were not required by the Fire Department's affirmative action plan. Unlike the Petitioners in this case, plaintiffs had a cognizable legal argument regarding the positions in question.

In *Cygnar*, thirteen white Chicago police officers were transferred from their positions in the Office of Municipal Investigation because of their race. The Seventh Circuit Court of Appeals upheld the district court's award of monetary relief, holding that race based personnel decisions which were not guided by a careful statistical analysis could not constitute a valid affirmative action plan. In *Lilly*, as in *Cygnar*, Beckley's informal affirmative action plan was not sufficient justification for its discrimination against the white male plaintiff in hiring for the police department. By contrast, in the present case, San Francisco was required by the Consent Decree to discard the test results as originally weighted. The reweighting was narrowly tailored to eliminate a proven adverse impact on minorities and women. And again, the plain-

tiffs in *Cygnar* and *Lilly* faced none of the procedural difficulties of standing and mootness presented in this case.

Unable to find Supreme Court precedent or decisions in other Circuits which conflict with the Ninth Circuit's holding, Petitioners resort to citing a District Court case, *Wilmington Firefighters v. City of Wilmington,* 632 F.Supp. 1177 (Del. 1986), *dismissed as moot*, 824 F.2d 262 (3rd Cir. 1987). The facts in *Wilmington* are similar to what happened in this case; the City of Wilmington reweighted examination components in a promotional examination in order to comply with a Title VII Consent Decree that forbad the use of examinations with a disparate impact on minorities. The District Court held that Wilmington had to go through the procedure contemplated by the Consent Decree in order to discard the initial test results. Wilmington would have to wait until the test results were challenged in court and attempt to defend them before the city could create a new scoring system. 632 F.Supp. at 1189. The court relied on testimony in the underlying discrimination case to support its interpretion of the Consent Decree.

In the present case, the Consent Decree did not contemplate further litigation to achieve the hiring and promotional goals set for the San Francisco police department. Both the District Court and the Ninth Circuit have agreed that the Consent Decree *required* that the City not use the initial test results. The Consent Decree in this case specifically incorporates the standards of the *Uniform Guidelines*, and, as shown above, the City's actions were permissible under these standards. Petitioners cannot use the interpretation of a completely different Consent Decree in a completely different case to govern the interpretation of San Francisco's own Consent Decree.

5. The questions of relief raised by this case involve narrow questions of the interpretation of a particular Consent Decree. Any decision by this Court would necessarily rest on these narrow grounds and would fail to resolve any important issues involving the application of Title VII.

This Court has granted broad discretion to District Courts to approve consent decrees in Title VII cases. In *Local 93, Int'l*

Ass'n. of Firefighters v. Cleveland, 478 U.S. 501 (1986), the Court held that Title VII permits consent decrees granting race-conscious relief in promotions as well as hiring. The Court strongly approved voluntary settlements of discrimination claims, and gave district courts broad power to approve relief even beyond what they could order after trial.

In this case, Petitioners' claim to anything other than injunctive relief (which, for the reasons noted above, it is no longer possible to grant) must rest on an interpretation of the Consent Decree which would have allowed the City to use the original weightings for the promotional examination. Petitioners themselves argue that the Consent Decree, not Title VII, required the City to defend the challenged test results before agreeing to change the weights of the test components (Petition for Cert., p. 15). Any decision regarding Petitioners' right to relief must be based on an interpretation of the Consent Decree. Such a decision would serve to resolve only the case at hand, and would not illuminate any broad questions in employment discrimination law.

B. In the Alternative, if the Writ is Granted, the Court Should Vacate the Ninth Circuit's Opinion as Moot

In *University of Texas v. Camenisch*, 451 U.S. 390 (1981), this Court granted a petition for a writ of certiorari and vacated the opinion of the court below as moot. The case was found to be moot because petitioners had completely complied with the requirements of the preliminary injunction being challenged. In this case, no injunction remained in effect for Respondents to obey. The case is moot because any actions which might have been enjoined have already been taken.

If Petitioners are granted a writ of certiorari in this case, the most appropriate result would be for this Court to vacate the opinion below as moot. The Ninth Circuit's opinions in this case have failed to offer to the parties any final and authoritative resolution of the dispute. Instead, the court has gone from remanding the case to the District Court, to dismissing it as moot, to holding that it is not moot, and that Petitioners should prevail, but that no remedy is possible. Where no remedy is available, the case *is* moot. *Mills v. Green*, 159 U.S. 651, 653; *Hall v. Beals*, 396

U.S. 45, 48. By vacating the Ninth Circuit's opinion on grounds of mootness, this Court could finally lay to rest the fruitless argumentation that has characterized this case.

CONCLUSION

For the foregoing reasons, appellants' Petition for a Writ of Certiorari should not be granted. If the Writ is granted, the decision of the Court of Appeals for the Ninth Circuit should be vacated as moot and remanded.

Dated: July 6, 1989

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No. 88-1984

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SAN FRANCISCO POLICE OFFICERS' ASSOCIATION, LYNNE A. TORRES, LILLIAN CHAI MATTOCH, and HENRY KIRK,
Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1. THIS CASE PRESENTS THE FUNDAMENTALLY IMPORTANT QUESTION OF WHETHER NON-MINORITY VICTIMS OF EMPLOYMENT DISCRIMINATION MAY BE DENIED MAKE WHOLE RELIEF WHERE THEIR PUBLIC EMPLOYER ABANDONED CONSENT DECREE EXAMINATIONS TO AVOID ADVERSE IMPACT ON MINORITIES AND WOMEN

The third (and final) Ninth Circuit decision (Appendix A) first clearly holds that the City violated the "no discrimination" provisions of the Consent Decree by changing examination scores on the basis of race and sex to favor minorities and women with no justification but then avoids the tough question of delineating minority and non-minority rights to promotional positions in the

Police Department. The Ninth Circuit erroneously identified the victims of discrimination as

> . . . . (N)ot the particular officers who had done well under the first weighting, as they had acquired no rights, but the larger group of all white males who took the test and who were passed over by the discriminatory weighting and subsequent promotions. (Appendix A-3)

The Court was wrong.

It was *not* the larger group of white males passed over by the discriminatory weighting who were victims, but the group of 51 white and minority males and females who were forever barred from the ranks of Sergeant and Inspector when the City, on April 6, 1986 (28 days after the filing of Appellants' Opening Brief in the Court of Appeal) made the fateful mistake of using the tainted promotional lists. The City knowingly assumed the risk of promoting the wrong people while the case was *sub judice* and must now pay the price to the right people.

The Ninth Circuit concluded (and the City and OFJ argue) that Petitioners ". . . . . acquired no rights . . ." under the original scoring scheme and that ". . . . (T)he test itself was not in compliance with the Consent Decree. . . .", because the initial results had an adverse impact on women and minorities. (Appendix A-2)

The Court (and the City and OFJ) are wrong again. The City was not justified in abandoning the use or defense of the examination upon a mere statistical showing of racially disparate results; Petitioners acquired rights in the presumptively valid examination procedures and should be granted some remedy.

This Court, in *Ward's Cove Packing Company, Inc. v. Frank Antonio* 487 U.S. ____, 101 L.Ed.2d 827, 109 S.Ct. 2115, 2125 (1989) held that mere underrepresentation of minorities alone will *not* suffice to make out a prima facie case of disparate impact:

> To hold otherwise would result in employers being potentially liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work

> forces". *Watson v. Fort Worth Bank and Trust, supra*, 487 U.S. at ____, 108 S.Ct. at 2787.

In accord, *Wygant v. Jackson Board of Education* 476 U.S. 267, 90 L.Ed.2d 260, 106 S.Ct. 1842 (1986); *Wilmington Firefighters v. City of Wilmington*, 632 F.Supp. 1177 (Del. 1986); *Bushey v. New York State Civil Service Commission*, 469 U.S. 1117, 83 L.Ed.2d 795, 105 S.Ct. 803 (1985), dissent of Chief Justice Rehnquist, Mr. Justice Berger and Mr. Justice White.

The City here tried a politically expedient short cut by concluding that a mere showing of statistical disparity justified race-conscious employment decisions—changing examination scores to benefit minorities and women, thereby discriminating against the 51 candidates displaced by the reweighting. *Wards Cove* forbids such a tactic.

Indeed, the Consent Decree provides that tests with disproportionately adverse impact may be used if they are otherwise valid under the *Uniform Guidelines on Employee Selection Procedures*. (Appendix H-18) Further, in California, rights (whether anticipated or presently held) in public employment are considered substantial, vested, and fundamental: *Lucchessi v. City of San Jose*, 104 Cal.App.3d 323 (1980) and *Cooperrider v. Civil Service Commission of San Francisco* 97 Cal.App.3d 495 (1979); see, generally, *Skelly v. State Personnel Board* 15 Cal.3d 195 (1975). In *Lucchessi* and *Cooperrider*, the Courts so held in regards to persons seeking *initial* employment, persons not yet even employed. California's Supreme Court has consistently emphasized that the rights of incumbent city employees to promotions under merit or civil service systems are entitled to zealous judicial enforcement (*Rhodehamel v. Civil Service Board*, 18 Cal.2d 709 (1941) and *Allen v. McKinley*, 18 Cal.2d 697 (1941). Indeed, California courts consistently hold that the civil service rules and regulations of a public agency constitute a part of the employees' implied contract of employment with the public agency. *Frates v. Burnett* 9 Cal.App.3d 63 (1970). While it may be true that a civil service system cannot create property rights on eligibility lists which are clearly the fruit of examinations unlawful under Title VII, this legal conclusion begs the question here presented, namely what property rights are acquired from eligibility lists

derived from examinations which, from all appearances, were content valid.

The City's position is that Petitioners herein had no right to promotions from "flawed" eligible lists, i.e., lists which showed adverse impact on minorities and women. But the City was required, under the Consent Decree, to substantiate the validity of the examinations rather than engage in any form of race-conscious manipulation of examination components.

This Court should grant review to determine and balance the reasonable and longstanding expectations of all candidates to fair, valid examinations based on merit, fitness and job relatedness against the City's ability to engage in voluntary "affirmative action".

2. THE CITY, AS A DISCRIMINATOR, HAD THE BURDEN OF SHOWING THAT INDIVIDUAL DISCRIMINATEES WERE DENIED PROMOTIONS FOR LAWFUL REASONS; HAVING FOUND DISCRIMINATORY ACTION, THE NINTH CIRCUIT SHOULD HAVE REMANDED TO THE DISTRICT COURT TO DETERMINE ALL REMAINING ISSUES

The City created victims of discrimination by promoting the wrong candidates from (at the time of the promotions) disputed eligible lists. Having gambled and lost on the question of liability, the City now has the burden, in the District Court, to show that the displaced candidates are *not* entitled to a remedy.

This Court in *Teamsters v. United States* 431 U.S. 324, 361-362, 52 L.Ed.2d 396, 431-432 (1977) confirmed the employer's burden to show remedial non-entitlement:

> . . . . . The question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. . . . The burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

The Eighth Circuit in *Firefighters Institute v. City of St. Louis*, 616 F.2d 350, 362-363 (8th Cir. 1980) required retroactive appointments of qualified (black) candidate discriminatees:

> . . . . . We do not feel that the demotion of the twenty-three whites and one black is an appropriate alternative.
>
> The only other available alternative is to require that a number of blacks be promoted to the position of fire captain and that their effective promotion date be the same as that of the twenty-four previously appointed captains. (Citations omitted.)

The twenty-four "beneficiaries" in St. Louis had been promoted from invalid lists.

Having promoted the "wrong candidates", the City must grant appropriate relief to the 51 displaced candidates: retroactive promotion, back pay, and seniority. 42 U.S.C. § 2000e-5(g). The Ninth Circuit, after determining that Petitioners were victims of discrimination, erred in failing to remand to the District Court to resolve remedial issues.

3. ANY PROCEDURAL ISSUES MAY BE RESOLVED ON REMAND BY THE DISTRICT COURT

The City and Intervenors (Officers' for Justice), in opposition to the Petition, argue that many of the actual 51 victims of "reverse discrimination" have not filed their own action, are not and cannot be represented by the Police Officers' Association, and are presently unidentified.

The original Complaint, filed by the SFPOA and three named candidates in state court, sought to stop the implementation of an illegal, discriminatory employment decision. The City created victims by subsequently promoting 120 candidates, including 51 candidates who would not have been promoted at all from the original weights, completely displacing 51 other candidates. Promotions were made in April of 1986, two (2) years after the filing of the original Complaint and eight (8) weeks after the filing of Petitioners' Opening Brief in the Ninth Circuit. Liability was not finally established until March 7, 1989, almost five (5) years after the Complaint was filed in state court.

All parties, at trial and on appeal, vigorously litigated the rights of the non-minority victims of discrimination. The district court had granted a preliminary injunction against the use of the reweighted tests to determine non-minorities' rights (Appendix F2), and the Court's final decision focused on whether non-minority rights were unnecessarily trammeled (Appendix F-9 to F-16). These same issues, including the prayer for a remedy to the non-minority victims of discrimination, were addressed in all appellate briefs and petitions for rehearing. Neither the City nor OFJ can or should now be heard to say that these issues have not been addressed by all parties. Any technical issues of pleading can, of course, be corrected upon remand.

First, the District Court has consistently recognized the POA as a full participating party in all Consent Decree matters:

> It is also very significant that this Decree was negotiated by representatives of the San Francisco Police Officers' Association (POA), of which the objecting sergeants are members. Its elected Board of Directors recommended the approval of the agreement and its membership approved the agreement by a 76% majority. The POA is a certified collective bargaining agent for the police officers of San Francisco, and it recently negotiated with the Police Department a Memorandum of Understanding that has the force of a collective bargaining contract in California. . . . . In summary, in strenuously opposing and helping to defeat a proposed settlement last spring because of its adverse impact on its members' interests and in consistently asserting the promotional interests of its members in proceedings before this court, the POA has convincingly demonstrated its commitment to its sergeants. The fact that the POA accepted this proposed Consent Decree is a persuasive argument that the Decree represents a fair and reasonable end to this litigation for these sergeants and other incumbent police officers. (Appendix, H-8 to H-9)

Second, the initial complaint filed by Petitioners is subject to a motion to amend under FRCP Rule 15(a)-(c), including the filing of a supplemental pleading. See *Soler v. G and U, Inc.* 103

FRD 69, (1984, S.D.N.Y.); *Andugar v. Rogowski*, 113 FRD 151, 155 (1986, S.D.N.Y.).

Third, FRCP Rule 21 provides broad discretion in the District Court to allow additional plaintiffs, even though the statute of limitations may have run. *Andugar v. Rogowski, supra*, 113 FRD 151, 154.

Fourth, Intervenor OFJ has represented, quite successfully, the rights of unnamed women and minority police officers over the years under the Consent Decree, and no one would suggest OFJ's lack of standing to do so. Why should the POA, merely because it represents non-minorities and men as well as women and minorities, be denied the same standing to assert the rights of its 1700-plus members? All such issues may be submitted to the District Court, after remand, by amendment of pleadings. *Jones v. St. Paul Fire and Marine Insurance Company* 108 F.2d 123, (5th Cir., 1939).

Finally, as to the conclusion by the Ninth Circuit, and the argument now advanced by the City and OFJ that Petitioners did not seek the remedies claimed now but not specifically prayed for in the initial complaint, it is undisputed that Petitioners did pray "for such other and further relief as this Court deems just and proper." Such language is construed as implying a request for damages under FRCP, Rule 54c; see *Doe v. Harris* 696 F.2d 109, 114, fn. 8 (D.C. Cir., 1982).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted, the decision of the Court of Appeals for the Ninth Circuit should be modified, and the case remanded to the District Court for determination of an appropriate remedy for Petitioners.

Dated: September 5, 1989.

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